REPORTS

OF

ADJUDGED CASES

IN THE COURTS OF

Chancery, King's Bench, Common Pleas, and Exchequer,

From Trinity Term in the Second Year of King GEORGE I. to Trinity Term in the Twenty-first Year of King GEORGE II.

Taken and Collected by the Right Honourable

Sir JOHN STRANGE, Knt.

Late MASTER of the ROLLS.

The THIRD EDITION, with Notes, and Additional References To Cotemporary Reporters and Later Cafes:

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IN TWO VOLUMES.

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1795.

Hilary Term

12 Georgii Regis. In B. R.

Sir Robert Raymond *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir John Fortescue Aland, *Knt.* } *Justices.*
James Reynolds *Esq.*

Sir Philip Yorke, *Knt. Attorney General.*

Sir Clement Wearg, *Knt. Solicitor General.*

Dominus Rex *verf.* Williams Major' de Helftone.

THE defendant was elected a corporator eight years ago, and an entry was made in the corporation books of his taking the oath of office, and the oaths of allegiance and fupremacy: it was now moved for an information in nature of a *quo warranto* upon the affidavit of the town clerk, who fwore, that he did not adminifter the oath of allegiance, though he made the entry in the manner it appeared to be. But the court would do nothing in it, after fo long an acquiefcence; and faid it would be of dangerous confequence, to allow a town clerk to difqualify members by his own oath, contrary to the record (1).

Where there is an entry of adminiftring oaths, there muft be a recent profecution if the fact be falfe.

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(1) *Rex* v. *Mayor and Burgeffes of Malmfbury*, 8 *Mod.* 55. S. P.

Dominus Rex *verſ.* Allington, Recorder of Hertford.

If a juſtice convicts without ſummons, there ſhall go an information.
L. Raym. 1407.
Ante 630.
1 Seſſ. Ca. p. 353. No. 281. S. C.

THERE being affidavit made, that no ſummons was had in the caſe of the *King* and *Venables*, the court granted an information againſt the juſtice who made the conviction (1).

(1) *Vide Rex* v. *Wykes*, *And.* 238. S. R. for ſigning an order of removal without ſummoning the party. *Ante* 46.

Caſe of the Priſon of the King's Bench.

Rules of the priſon inlarged till priſon repaired (1).

THE priſon being in a ruinous condition, and the late rains having broke in, there was an order made for the proprietors to attend the court; and upon their attendance the court was moved to enlarge the rules of the priſon, ſo as to take in the *Marſhalſea*, that the priſoners might be removed thither. But the court would do nothing in it, till there was an undertaking by rule of court to put the priſon in repair, which they ſaid the proprietors were obliged to do, upon pain of forfeiting their right. Whereupon the proprietors ſubmitted to a rule, and the rules were enlarged accordingly.

(1) *Vide* two rules for aſcertaining the boundaries of the King's Bench Priſon, *Eaſt.* 30 *Geo.* 3. 3 *Term Rep.* 583.

Between the Pariſhes of Kinver *and* Stone in com' Stafford.

Renting a coney warren is a ſettlement.
Salk. 536.
2 Seſſ. Ca. p. 114. No. 109.

UPON a ſpecial order of ſeſſions, it was ſtated, that a poor perſon rented a coney warren and a cottage upon it at 10*l. per ann.* which the juſtices were of opinion did not gain him a ſettlement within the ſtatute of *Car.* 2. *Sed per curiam*, A mill has been held to be a tenement within that ſtatute, and why not this? It is his ability to pay 10*l. per ann.* that is the foundation of the ſettlement, and whether he pays it for a houſe for habitation, or for a warren which brings him in a profit, is not material: the order of ſeſſions muſt be quaſhed (1.)

(1) *Rex* v. *Piddletrenthide*, 3 *Term Rep.* 772. S. P.

Harrison *verſ.* Winchcombe.

STRANGE moved for leave to plead *non aſſumpſit*, and *non aſſumpſit infra ſex annos*, and cited *Folkes* v. *Smith in C. B. Mich.* 12 *Geo.* where there was the like rule; and in the principal caſe it was ordered accordingly. Plea double.

Mich. 13 *Geo. Briſtow* v. *Woodward* granted again on my motion. *Eodem termino Toephen* v. *Elking* the ſame rule (1).

(1) *De Coſta* v. *Carteret*, *poſt.* 889. *King* v. *Boſwell*, *Barnes* 329. acc. Adm. *Garnett* v. *Harriſon*, *ib.* 348. *Stritburſt* v. *Graeme*, 2 *Black.* 723. But *Whelpdale* v. *Atkinſon*, *Fort.* 377. is contra. *Forteſcue* J. *diſſentiente.* Et *vide Baker* v. *Weſtbrook*, *poſt.* 949.

Dominus Rex *verſ.* Buck. [679]

STRANGE moved to quaſh an indictment for killing a hare, this not being a matter indictable, the ſtatute of 5 *Ann. c.* 14. appointing a ſummary proceeding before juſtices of the peace; and cited *Rex* v. *James*, *Trin.* 1 *Geo.* where an indictment for keeping an alehouſe was quaſhed, becauſe the ſtatute 3 *Car.* 1. *c.* 3. had directed a particular remedy. *Et per curiam*, The indictment muſt be quaſhed. Indictment lies not for killing a hare. 1 Seſſ. Ca. p. 370. No. 295.

Parker *verſ.* Stanton.

TO the *ſcire facias quare executio non* upon a writ of error, the plaintiff in error pleaded, that the damages recovered were levied upon a *fieri facias*. And *Strange* moved to ſet aſide this plea, ſaying it was never the intent of the court to give the party a liberty to plead to it, when it was only a method uſed to bring in the party to aſſign his errors; and that if this was to be once allowed, it would be done in all caſes, and be an effectual method to get one term extraordinary upon every writ of error, by obliging the party to go to trial upon an iſſue to the *ſcire facias*, whilſt the writ of error ſtood ſtill for want of an aſſignment of errors. And he cited *Elmes* v. *Martin in B. R. Hil.* 10 *Geo.* where a plea of payment (which is the ſame in reaſon with the preſent caſe) was ſet aſide. The Chief Juſtice at firſt made a difficulty of ſetting aſide this plea, becauſe it might be true, and then why ſhould the party be brought in to ſhew cauſe Practice in error. L. Raym. 1414.

 why

why there should not be execution, when it has been had already. But the other Judges made no difficulty of setting it aside, on account of the apparent delay that it would introduce. And if execution has been had, the defendant may go on with his writ of error to obtain a restitution. So after great debate the plea was set aside. And in the debate of this case it was said by the court, and the secondary, that if issue had been joined on this plea, and it had been found for the defendant in error, he might have taken out execution, but could not *non pros.* the writ of error, till after a rule to assign errors (1).

Instrumentum ligneum well enough in trover. Post. 809.

After this errors were assigned; and when the cause came on to be argued, it appeared to be an action of trover *pro duobus instrumentis ligneis, Anglice stands.* And it was objected by *Fazakerley*, who cited *Cro. El.* 817. 1 *Lev.* 48. *Sti.* 327. that there was a proper *Latin* word for *stands*, and therefore *instrumentum ligneum*, which would serve for any thing made of wood, was too general: but the court held it well enough, and the judgment was affirmed.

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(1) *Ante* 390.

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Welsh *vers.* Craig.

Debt lies not upon a promissory note. 8 Mod. 373. S. C.

DEBT upon two promissory notes and a *mutuatus*. And on demurrer to the declaration, I objected, that an action of debt would not lie: that before the statute no action at all lay upon the note, as a note, (*Salk.* 129.) nor did an *indebitatus assumpsit* lie on a bill of exchange (1). And the only remedy given upon the note by the statute, is the same that was before on an inland bill of exchange. And of this opinion was the court, and pronounced judgment for the defendant (2). But then it was observed by Serjeant *J. Comyns* for the plantiff, that there was one good count upon the *mutuatus*, and the demurrer was to the whole. Whereupon judgment was given for the plaintiff, which I believe it will be difficult for him to enter, so as to maintain it.

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(1) *Hodges* v. *Steward*, *Salk.* 125. acc. *Kessebower* v. *Tims*, *B. R. E.* 22 *G.* 3. *contra*.

(2) *Quære et vide Bayley* on *Bills* 46. and the note.

was to enter into a rule for cofts. The court granted the laft part, but as to the cofts they faid it was never done, but where it appeared the party was vexatious, or had run the defendant to a great expence, which was Lord *Coningfby*'s cafe, who came for a trial at bar on his new ejectment, after the former caufe was ready for the bar, which was a matter of mere favour, in which they might make their own terms.

Dobs *verf.* Edmonds.

Necnon de eo quod after a *quod cum* is a pofitive charge.
L. Raym. 1413.
2 Show. 295.
Cro. Jac. 536.

THE plaintiff declared in trefpafs with a *quod cum*, and then went on to another trefpafs, which was introduced with a *necnon de eo quod, &c.* The verdict was *pro quer'* as to the laft part, and *pro def'* as to the trefpafs under the *quod cum*. And it was moved in arreft of judgment, that the whole was but recital. *Sed per curiam*, We muft not extend that exception, which has gone far enough already: the latter part is by way of pofitive charge, and the finding of the jury has cured it as to the firft. The plaintiff muft have judgment.

White *verfus* Cleaver.

Where a plea is general *quod indempnem confervavit*, it muft be fhewn for caufe that it does not fay *how*. But it is good on general demurrer.
L. Raym. 1416.
1 Lev. 194. 283.

DEBT upon a bond conditioned to indemnify the plaintiff. The defendant upon *oyer* pleaded generally, *quod indempnem confervavit*, without fhewing how. And on a general demurrer it was agreed the plea was ill before the act for amendment of the law, for that no iffue could be joined upon it. 2 *Cro.* 165. *Hob.* 296. 2 *Co.* 4. 2 *Cro.* 363. 503. 634. But then it was objected, that this fhould have been fhewn for caufe of demurrer. And of that opinion was the court, for the fubftance is the faving harmlefs, and how that was done, is but matter of form; fo the plaintiff prayed leave to difcontinue upon payment of cofts, which was granted accordingly.

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Portman *verf.* Came.

Where executor muft declare as executor, he fhall pay no cofts.
L. Raym. 1413. cited in Andrews 357.
Poft. 1106.

THE plaintiff brought an action of debt upon a bond as executor, and upon *oyer* it appeared to be conditioned, "that the defendant fhould not hunt in any of the lands of the "teftator," and in the replication, a breach was affigned by a hunting in the time of the executor; and a verdict for the defendant.

And

And now Serjeant *Chapple* moved for costs, because the hunting, which was the cause of action, arose in the time of the executor, and was matter within his knowledge. 6 *Mod.* 91. 181. 1 *Vent.* 92. *Sed per curiam*, The cases are only where he needed not declare as executor; and so was *Baller* v. *Delander*, *Trin.* 1 *Geo. in B. R.* But here the bond was the cause of action, and he was obliged to declare as executor; and therefore they denied costs. Lat. 214. 220. See 3 Burr. Rep. 1451.

Lady Cass *versus* Title.

ERROR of a judgment in *C. B.* in ejectment on four demises of a different commencement and continuance: verdict for the plaintiff against two defendants only as to one third part of 28 acres of meadow; and as to the rest of the premisses, and all the other defendants, Not guilty: upon which there is judgment, that the plaintiff should recover *terminum suum præd' de et in præd' una tertia parte præd'* 28 *acrarum prati* against the two defendants who are found guilty, and that the acquitted defendants shall recover 7 *l.* costs. Verdict uncertain.

Upon this judgment the two defendants, who were found guilty as to part, bring a writ of error, and assign the general errors. And *Strange pro quer' in errore* objected, that the verdict and judgment are uncertain.

1. For that the plaintiff declares on four several demises of a different commencement and continuance, and yet the judgment is only to recover *terminum suum præd'* in the singular number, without determining which of the terms he shall recover. *Hil.* 4 *Geo. B. R. Hodson* v. *Backhouse:* the writ of error was *de quadam transf. et ejection' firmæ* instead of *firmarum*, there being two demises: and quashed.

2. It is impossible for the sheriff upon this judgment to know what he is to deliver possession of, for there are four demises of four different 28 acres of meadow, and whether the plaintiff is to have those which *A.* demised, or those which *B.* or *C.* or *D.* demised, is uncertain; it should have been to recover the 28 acres of meadow which the first, or second, or third, or fourth lessor demised. 1 *Book of Judgments* 74. 2 *Ditto* 119. 2 *Roll. Abr.* 694. 1 *Roll. Abr.* 779. By this verdict no body can say which of the lessors title is established, nor can either of them bring an action upon it for the *mesne* profits. [683]

Whitaker Serjeant *contra* did not offer to answer the objections, but said they would try below and get it set right: at present he took an exception to the writ of error, that it was

Variance.

only to remove a record of an ejectment between the plaintiff and the two defendants who are found guilty; whereas it appears by the record, that there were eleven other defendants to the suit: and though the writ can be brought only by these two *ad grave damnum* of themselves, yet the suit must be described as it really was. *Et per curiam*, So it should, and the case of *Cook* and *The Dutchess of Hamilton* (*a*) was cited (1). Then *Strange* insisted, that it was amendable by the late act (2); and of that opinion was the court, so the writ of error was amended. And as to the objections to the judgment, it was adjourned, to give the defendant in error an opportunity to set it right if he could.

(*a*) Co. Ca. of Prac. 10.

(1) *Brewer* v. *Turner*, *ante* 232. and the cases there cited.

(2) 5 *Geo.* 1. *c.* 13. *Atkins* v. *Paine*, 2 *Ld. Raym.* 1532. *contra.*

Dent *verf.* Lingood.

How the entry shall be where a release of errors is found.

THE defendant in error pleaded a release of errors, which was found for him; and the court ordered the entry to be, that the plaintiff should be barred of his writ of error, not *quod affirmetur* (1).

(1) *Cunningham* v. *Houston*, *ante* 127. S. P. *Vide* also *Davenant* v. *Raftor*, 2 *Ld. Raym.* 1046.

Between the Parishes of Westham *and* Chiddingstone.

Woman's settlement before marriage remains, if husband has no settlement. Fol. 288. 1 Sess. Cas. 80.

IT was stated, that a single woman settled at *C.* was married to a man who is since dead, but his settlement did not appear: *Et per curiam*, Her settlement before marriage stands (1).

2 Bott 97. pl. 133. S. C. *Mich.* 1 *Geo. int. paroch. Dunstwell* and *Upotery*, S. C. held so likewise. Sess. Cas. 104. S. P.

(1) *Reg.* v. *Wilsborough Green*, *Fol.* 249. *Shadwell* v. *St. John's Wapping*, *Andr.* 307. *Rex* v. *Norton*, *Burr.* S. C. 122. *Rex* v. *St. Botolph Bishopsgate*, *ib.* 367. S. P.

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Hughes *verf.* Alvarez.

Writ of inquiry amended. 2 L. Raym. 1409. Cited by Andrews 78.

IN an action upon the case upon two promises, there was judgment for the plaintiff as to the first promise, and as to the second a *nolle pros.* A writ of inquiry is taken out to inquire what damages the plaintiff had sustained *occasione præmissorum*, and upon the return of this it was moved to amend the writ, and make it *occasione non performationis præd' primæ promissionis:* and upon the authority of *Baker* v. *Cambell*, *Paf.* 4 *Ann. in B. R.* the writ was amended in this case, the record of the judgment by default being a warrant to amend by.

Haywys *verf.* Savage.

A Special *capias* by original was taken out returnable *craftino animarum*, and for want of a plea to enter before the effoin day of *Hilary* term judgment was figned the 19th of *January*, which was now moved to be fet afide. And it was agreed, that if this had been by bill, the defendant would not have been obliged to plead till within *Hilary* term. But I infifted, that it being a fpecial *capias*, wherein the whole cafe was fet out at large, it made it more reafonable, than where there is only a common *capias de placito tranfgreffionis*. And it has been always taken to be for the expedition of the plaintiff, to fue out thefe fpecial writs: whereas if this judgment be fet afide, it will be putting them upon the fame foot with a common *latitat*. The fact and practice was certainly on my fide, but the court, out of a difinclination to favour proceedings by original, would not allow there was any difference, but fet afide the judgment: fo that now there is no advantage in taking out a fpecial *capias*, and therefore I fuppofe it will be difcontinued.

Upon a fpecial *capias* by original the defendant fhall not be obliged to plead fooner than upon a common *latitat*. Tid. Prac. K. B. 243.

Helbut *verf.* Held.

ERROR of a judgment in *C. B.* after verdict for the plaintiff. And it was affigned for error, that *Edward Richier*, who was fworn as a juror returned upon the principal pannel, was never returned by the fheriff; and alfo that there was diminution in the record, for want of the *venire facias* and *habeas corpora*. And to this *in nullo eft erratum* was pleaded.

No error to be affigned contrary to the record. L. Raym. 1414.

[685]

Parker pro quer' in errore objected, that *in nullo eft erratum* was a confeffion of the errors affigned, and then no doubt but that in point of law the fwearing a perfon upon the jury, who was never returned by the fheriff, will make fuch an error in the proceedings, as will overthrow the judgment. 5 *Co.* 42.

Strange contra. I admit that where a matter of fact properly affignable is affigned for error, *in nullo eft erratum* will be a confeffion; but where the matter alleged is not by law affignable, there *in nullo eft erratum* is a demurrer in law; it is infifting the party

Where a fact properly affignable for error is affigned *in nullo eft erratum* is a confeffion of the fact (1). But where it is not fo, it is a demurrer in law. (2)

(1) *Vide Hopkins* v. *Wigglefworth*, 2 *Lev.* 38. *Yelv.* 57.

(2) *Hudfon* v. *Banks*, *Cro. Jac.* 28. S. P. *Haydon* v. *Minn*, *Cro. Jac.* 521. 2 *Roll. Rep.* 53. *Jenk.* 332. S. C. *Yelv.* 58. *Cole* v. *Green*, 1 *Lev.* 311.

party has no right to assign such a matter for error, and that therefore the defendant ought not to be drawn into an inquiry about the truth of it. And I take it the error here alleged is not assignable, as being contrary to the record: for after the joinder in issue, the record goes on to the award of a *venire facias* returnable at such a day, *ad quem diem* says the record, *jurata inter partes præd' ponitur in respectu* till the next term, *nisi prius* the Chief Justice comes to *Guildhall:* at which time he comes, *et juratores unde infra fit mentio exacti unus eorum*, (that is, one of those returned by the sheriff) *viz. Edwardus Richier ven' et in juratam illam juratus existit:* so that the record expresly says, that the *Edward Richier* who was sworn, was one of them that was returned by the sheriff; and therefore the error assigned is contrary to the record: and that such an error is not assignable, I rely on 1 *Roll. Abr.* 758. *pl.* 8. If *A. B.* is sworn upon the principal pannel, and another of the same name is sworn upon the *tales*; it shall not be assigned for error, that the *A. B.* first sworn and *A. B.* the *tales* man were one and the same person, so as to make it a trial by eleven jurors only; for that this (says the book) is contrary to the record, which says that they who were sworn upon the *tales* were *alii de circumstantibus:* he could not be *idem* consistently with the record, which says that he was *alius:* and therefore such an averment, contrary to the record, is not to be admitted.

As to the diminution alleged, I shall make no difficulty after a verdict, of admitting even that there are no such writs at all.

Et per curiam, The case in *Rolle* is exactly in point, and according to the reason of the law in other cases; therefore the judgment must be affirmed.

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Dominus Rex *vers.* Popplewell.

In conviction for swearing the oaths must be set out. 1 Sess. Cas. p. 356. No. 283. S. C.

CONVICTION for profane cursing and swearing was quashed, for want of the particular oaths and curses being set out (1).

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(1) *Rex* v. *Sparling*, *ante* 497. S. P.

Anonymous.

Mandamus to churchwardens to call a vestry to elect churchwardens refused.

STRANGE moved for a *mandamus* to be directed to the church-wardens of St. *Botolph Bishopsgate*, commanding them to call a vestry in *Easter* week, for the election of churchwardens; but

but the court refused it, saying there was no instance of such a *mandamus*, and they could not take notice who had a right to call the vestry, and consequently did not know to whom it should be directed (1).

(1) Mandamus to churchwardens to make a rate for repairs of a parish church denied. *Rex* v. *Churchwardens of St. Peters Thetford*, 5 *Term Rep.* 364.

Dominus Rex *vers.* Betts et all'.

Amendment on the crown side.

TO a *scire facias* on the crown side upon a recognizance for keeping the peace, the defendant as to the breach assigned pleaded Not guilty, but concluded with an averment, instead of concluding to the country: and after a demurrer, I moved to amend the plea: and the court gave leave to amend it accordingly.

Dominus Rex *vers.* Pappineau.

2 Seff. Ca. p. 34. No. 39. S. C. Indictment for a nusance, laying it to be committed near the highway, and also near several dwelling houses, &c. is sufficient. (1) Where a nusance is temporary, as the steeping stinking hides, &c. there need not be judgment that it be abated (2).

THIS was a writ of error directed to the justices of the peace of the county of *Surrey*, to remove a conviction for a nusance upon an indictment setting forth that the defendant such a day, *Super quendam rivum sive aquæ cursum ibidem vocat' Wandle prope adjacen' et contigue adjungen' communi altæ viæ Regiæ ibidem vocat' Tooting-Lane, necnon prope separales domus mansionales diversorum ligeorum et subdit' dicti Domini Regis, erexit et ædificavit quandam molam depsere coria* (*Anglice* to dress hides) *et macerare cutes ovium in aqua* (*Anglice* to steep sheep skins in water) *et quod præd'* (*def'*) *apud molam præd' depsuit et maceravit triginta cutes ovium magnum foetorem et insalubrem odorem emittentes, et easdem cutes in quodam loco ibidem prope communem altam viam Regiam præd' posuit et locavit, per quod aer ibidem maxime corrumpebatur et adhuc corruptus et infectus existit ad commune nocumentum, &c.*

After not guilty pleaded a trial is had, and the defendant found guilty; upon which the judgment of the court is entered, that the defendant be fined 100*l.* for the said nusance, *et capiatur &c.* Upon this judgment the general errors are assigned, and the coroner and attorney pleads *in nullo est erratum*. [687]

(1) *Rex* v. *White and Ward*, 1 *Burr.* 333. S. P.

(2) *Vide Rex* v. *White*, 1 *Burr.* 338.

Strange

Strange pro querente in errore argued, that this ſhould be reverſed. And his firſt objection was, that as it was laid, it was not a fact indictable, it not being laid to be *in* but *near* the highway, for the *per quod aer ibidem* muſt refer to the erection, which is laid to be upon a rivulet *near* the highway, and if it be not *in* the highway, an indictment will not lie. *Sed per curiam*, Surely this is well enough. If a man erects a nuſance *prope adjungen'* to the highway, *per quod* the air thereabouts is corrupted; it muſt in its nature be a nuſance to thoſe who are in the highway, and therefore the indictment is well enough.

Then I went on to another objection, (and which I principally relied upon) that the judgment was erroneous for want of an adjudication that the nuſance be abated. The end of the law in giving an indictment for a publick nuſance is, to have the whole removed by one ſuit, and to avoid a multiplicity of actions. And it is preferred before an action upon the caſe, becauſe in that each party can only recover his ſeparate damages, whereas upon an indictment there may be an end of the thing at once. By theſe indictments the publick inconvenience is to be removed, which can be no other way effected, than by a judgment to abate the nuſance; for as to a fine, the publick is never the better for that, and a man in many caſes may find it worth his while to pay a fine, and continue the nuſance, in which caſe the publick has no redreſs.

Salk. 632. 4 Mod. 395. Cumb. 369. Parl. Ca. 127. In the caſe of the *King* v. *Walcot*, which was an attainder for high treaſon, the words *ipſo vivente* were omitted, and that was held a ſufficient error to reverſe that attainder; and yet that is not in ſo material a part as this; for there being a judgment that he ſhould ſuffer death, (which is *extremum ſupplicium*) it was but an omiſſion in the form; but the court ſaid that the common law having made that part of the judgment, it was not in the power of the court to omit it: in this caſe the principal judgment that the law has appointed is, that the nuſance be abated, to which the court may add the further puniſhment of a fine; but unleſs they give judgment to abate the nuſance, the publick is no better for this proſecution, but there muſt be a multiplicity of actions, which it is againſt the policy of our law to admit, where it may be prevented. The intereſt of the publick is ſo great, that in *Salk.* 458. it is held, that for the concern of the publick an act of general pardon ſhall take away the fine, but not the abatement. And an indictment for a nuſance is not good, unleſs it concludes *ad commune nocumentum* of the King's ſubjects: which ſhews that the removing the common nuſance is the chief end of the indictment.

There

There are few precedents to be found of thefe judgments entered at large. *Bro. Nufance* 39. it is faid how the judgment ought to be, which is an abatement and a fine; and in the *Old book of Entries* 144. *b.* in an affize of nufance for diverting a watercourfe the entry is, *quod nocumentum præd' amoveatur et trenchea præd' obftruatur.*

And it is no objection to fay, that this is an error for the advantage of the defendant. It was for *Walcot's* advantage to have that painful circumftance omitted, but the court would not take that into confideration, and held it ill, as varying from the judgment which the law had appointed. If upon an indictment for murder the defendant fhould have judgment to be whipt; will any body fay this is a good judgment, and yet furely it is for the benefit of the defendant.

Fazakerley contra. Every judgment muft be according to the circumftances of the cafe. This is not a permanent, but a tranfitory nufance, in dipping of fkins, and I do not know how that is to be abated: we may truft the court in fetting fuch a fine as will be as effectual as an abatement: the defendant may have left off dipping his fkins, and that is all the abatement the thing is capable of.

C. J. Regularly the judgment ought to be, to abate fo much of the thing as makes it a nufance. 9 *Co.* 53. *Godb.* 221. *Winch* 3. If a houfe be built too high, fo much of it as is too high fhall only be pulled down (3). The cafes cited by Mr. *Strange* were of a permanent nufance; but here erecting the mole is not the nufance, (for it might be lawful to do that) but the nufance arifes from the ufe he puts it to. If a dye-houfe, or any ftinking trade were indicted, you fhall not pull down the houfe where the trade was carried on. I think here could be no judgment to abate any thing, and therefore the judgment muft be affirmed.

To which *Powys* J. agreed. *Et per Fortefcue* J. The queftion is, whether in the cafe of a publick nufance it is not neceffary to give two judgments in all cafes. I am not fatisfied this is not a permanent nufance; the erecting is the caufe of the nufance, and the conclufion of the indictment *ad commune nocumentum* goes to the whole, as well the erection as the dipping. I remember the cafe of a glafs houfe, where the judgment was to abate the nufance, not that the houfe fhould be pulled down, but only to prevent his ufing it again as fuch; which might have

(3) *Cooper* v. *Marfhall*, 1 *Burr.* 259. S. P.

been

been done in this cafe, to prevent his dipping fkins again. *Co. Ent.* 92. *b.* 9 *Co. Batten's* cafe: it appears the plaintiff could not go on for damages after the defendant had abated the nufance, which fhews an abatement to be the moft neceffary part. 2 *Roll. Abr.* 84. And as no inftance is given, where the judgment has varied in purfuance of the diftinction now fet up between permanent and tranfitory nufances, I am of opinion that this judgment is erroneous, and ought to be reverfed.

Reynolds J. I think the judgment is right. Every judgment fhould be adapted to the nature of the cafe: where the erection is the nufance, there ought to be a demolition: roafting of coffee was formerly thought a nufance, and yet no body ever imagined the houfe in which it was roafted fhould be pulled down: and what other way is there to abate fuch a nufance? A glafs-houfe is a nufance in its own nature; but this is a lawful act, provided the fkins which are dipt are not ftinking fkins. I fhould think it would have been going too far, if they had adjudged the whole erection to be abated for a particular abufe of it in dipping fome ftinking fkins.

The Judges took further time to confider of it; and in *Trinity* term following it was mentioned again, and all ftanding to their former opinions, it was adjourned.

N. B. It was put in the paper about a year after, and no body appearing for the defendant, the judgment was affirmed.

Hafket *verf.* Strong. At the Rolls.

Third mortgagee buying in the firft fhould be prior to the fecond (1).

MR. *How* made a mortgage for 500 years, dated 9 *June* 1720, to *Neal*. He afterwards made a mortgage in fee to the plaintiff; and *Neal* affigned to the defendant, who afterwards advancing more money took a conveyance of the inheritance, with an agreement that the term fhould be kept on foot as an additional fecurity: the term was never affigned over to a third perfon. And on the queftion touching priority it was agreed, that if the term had been regularly kept on foot, the defendant would have been in the common cafe of a third mortgagee taking in the firft incumbrance to protect himfelf, by which he would have had the law on his fide; whereas here the term was merged upon the grant of the inheritance, and therefore at law it would be with the plaintiff, who had the firft mortgage

(1) *Vide Hagfhaw* v. *Yates, ante* 240. and the note.

in

in fee. To which it was anfwered, and decreed by the court, that the plaintiff's conveyance of the inheritance interpofing between the term and the defendant's grant, the grant of the defendant was void in law, the grantor having nothing in him; and then the term could not be merged in a void grant of the inheritance, and the defendant muft be firft paid his whole money. *Strange pro defendente.* [690]

Southerton *verf.* Whitlock.

At Guildhall coram Raymond *C. J.*

Infant bound by promife of payment at full age.

IT was held, that if goods which are not neceffaries, are delivered to an infant, who after full age ratifies the contract by a promife to pay, he is bound: and he left it to the jury whether there was any confirmation of the contract at full age (1).

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(1) *Per Holt* C. J. in *Hylling* v. *Haftings*, 1 *Ld. Raym.* 389. S. P. *Borthwick* v. *Caruthers*, 1 *Term Rep.* 648. *Cockfhott* v. *Bennet*, 2 *Term Rep.* 766.

Lambell *verf.* Pretty John.

Error *coram vobis* lies not after affirmance in Exchequer Chamber.
1 Roll. Abr. 755. pl. 16.

JUDGMENT was given in *B. R.* in trefpafs, and on error in the Exchequer Chamber the judgment was affirmed. The defendant then brought a writ of error *coram vobis in B. R.* which Mr. *Parker* moved to quafh, and cited 1 *Vent.* 207. 2 *Lev.* 38. 3 *Salk.* 333. 3 *Keb.* 28, 29. that it will not lie after an affirmance.

Belfield Serjeant infifted, the record never was removed from *B. R.* and that debt would ftill lie upon it. *Sed per curiam*, Before the ftatute of *Eliz.* we could not examine our own errors in fact after an affirmance in Parliament: and the Exchequer Chamber is now in the fame degree with regard to us, as the Parliament was before. The writ of error muft be quafhed.

East-India Company *verſ.* Pullen.

At Guildhall coram Raymond *C. J.*

If I ſend my ſervant with the goods, the carrier is not liable. (1)

ACTION againſt the defendant as a common carrier, on an undertaking to carry for hire on the river *Thames* from the ſhip to the company's warehouſes. Upon the evidence it appeared, the defendant was a common lighterman, and that it was the uſage of the company on the unſhipping of their goods to clap an officer, who is called a guardian, in the lighter, who as ſoon as the lading is taken in puts the company's lock on the hatches, and goes with the goods to ſee them ſafe delivered at the warehouſe. It appeared to be done ſo in this caſe, and part of the goods were loſt.

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The Chief Juſtice was of opinion, this differed from the common caſe, this not being any truſt in the defendant, and the goods were not to be conſidered as ever having been in his poſſeſſion, but in the poſſeſſion of the company's ſervant, who had hired the lighter to uſe himſelf. He thought therefore the action was not maintainable, ſo the plaintiffs were nonſuited. *Strange pro quer.*

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(1) 1 *Com. Dig.* Action againſt a common carrier (C. 1.) 299.

Price *verſ.* Brown.

At Guildhall coram Raymond *C. J.*

Plea of payment of the principal and all intereſt, ſupported by proof of payment of leſs, accepted by plaintiff in full.

UPON payment after the day and before bringing the action, it was pleaded to be a payment of the principal and all intereſt then due: on evidence it appeared a groſs ſum was paid, which upon computation did not amount to the full intereſt, but it was ſworn that the plaintiff accepted it in full. I objected, that they ought to prove it as they had pleaded; but the Chief Juſtice thought it well enough, upon which there was a verdict. And the next term I moved on affidavits of the falſity of the defence, and that we did not expect any defence, and therefore were not ready to contradict the ſingle witneſs who ſwore to the payment of the money. But the court would grant

grant no new trial, faying it would be of dangerous confequence, to fuffer people to be fetting up new evidence, after they knew what was fworn before.

No new trial where party might have had evidence on firft trial (1).

(1) *Richards* v. *Syms*, 1742. *Bull. L. N. P.* 326. *Walker* v. *Scott*, *H.* 23 *Geo.* 2. *ib.* 327. *Spong* v. *Hog*, 2 *Black. Rep.* 803. *Gift* v. *Mafon*, 1 *Term Rep.* 84. *Vernon* v. *Hankey*, 2 *Term*, *Rep.* 113. S. P. But upon fpecial circumftances the court will grant a new trial on account of furprize. *Edie* v. *The Eaft India Company*, 3 *Burr.* 1216. 1 *Black. Rep.* 295. S. C. So alfo upon the difcovery of a very material piece of written evidence in the cuftody of defendant's attorney at the time of the trial, but without his knowledge. *Broadhead* v. *Marfhall*, 2 *Black. Rep.* 955.

Chambers *verf.* Robinfon.

IN an action for a malicious profecution of an indictment for perjury, the Chief Juftice allowed the plaintiff to give in evidence an advertifement put into the papers by the defendant of the finding the indictment, with other fcandalous matter, though an information had been granted for it as a libel, not (as he faid) that the jury were to confider it in damages, but only as a circumftance of malice.

In action for a malicious profecution, an advertifement put in the papers by defendant, pending the indictment, is evidence, though an information had been granted for it. 1 Barn. B. R. 22. S. C. but not S. P.

Upon the trial it appeared, the perjury was ill affigned, fo that the now plaintiff could not have been convicted; and that exception was taken to it by the judge, and he was acquitted without examination of any witneffes. But the Chief Juftice held the action lay, though it was a faulty indictment, relying upon the cafe of *Jones* v. *Gwynn*, where the diftinction in *Salk.* 13. was denied, and held by the whole court that the action would lie, though the *indictment was bad; a bad indictment ferving all the purpofes of malice, by putting the party to expence, and expofing him, but it ferves no purpofe of juftice in bringing the party to punifhment if he be guilty.

Action lies for malicious profecution of a bad indictment. Bull. L. N. P. 13. (1) Salk. 15. 10 Mod. 148. 214. Gilb. Caf. Law and Eq. 185. poft. 978.

Whereupon the jury gave the plaintiff 1000*l.* damages, and the next term the defendant moved the court for their judgment upon this point, (which was faved at *nifi prius*) and for leave to move for a new trial after the court had given their opinion upon the point, which was granted: and as to the point of law, the court made no difficulty of agreeing with the cafe of *Jones* v. *Gwynn*,

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New trial granted for exceffive damages, but the fame damages being given a fecond time, another trial cannot be had.

(1) *Wicks* v. *Fentum*, 4 *Term Rep.* 247. S. P.

Gwynn, and the defendant's counfel did not feem to think the reafon and authority of that cafe was to be fhaken.

Then the defendant moved for a new trial on account of the exceffivenefs of the damages; and the court faid it was but reafonable he fhould try another jury, before he was finally charged with 1000*l.* So a new trial was granted upon payment of cofts. And a new trial being had, the fame damages were given again; upon which the defendant applied to the court, who faid it was not in their power to grant a third trial; and fo is *Salk.* 649. the
6 Mod. 22. cafe of *Clerk* v. *Udal* (1).

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(1) *Afh* v. *Afh*, *Comb.* 357. *Hurry* v. *Watfon*, *Tr.* 24 *Geo.* 3. 4 *Term Rep.* 659. n. acc. *Wood* v. *Gunfton*, *Styles* 466. *Burr.* 364. *Lord Townfend* v. *Dr. Hughes contra. Atkyns* J. *diffentiente*, 1 *Mod.* 232. 2 *Mod.* 150. *Roe* v. *Hawkes*, 1 *Lev.* 97. *Welford* v. *Berkley*, 1 *Burr.* 609. *Chum* v. *Briggs*, cited *ib. Duberley* v. *Gunning*, 4 *Term Rep.* 651. *Contra Buller* J. *diffentiente. Vide Huckle* v. *Money*, 2 *Wilf.* 205. Where a new trial was refufed on the ground that the damages were not exceffive. So alfo *Redfhaw* v. *Brook*, 2 *Wilf.* 405. *Bruce* v. *Rawlins*, 3 *Wilf.* 61. *Ducber* v. *Wood*, 1 *Term Rep.* 277. *Leith* v. *Pope*, 2 *Black.* 327. *Benfon* v. *Frederick*, 3 *Burr.* 184. In *Dove* v. *Martin*, *Comb.* 170. But in moft of thefe cafes the court admitted their power to grant a new trial for exceffive damages in cafes of cofts; and fee the cafes cited in *Hayward* v. *Newton*, *poft.* 940.

Eafter Term

12 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Juftice.*

Sir Littleton Powys, *Knt.*
Sir John Fortefcue Aland, *Knt.* } *Juftices.*
James Reynolds, *Efq;*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Efq;* *Solicitor General.*

Lorymer *verf.* Hollifter.

THE bailiff, who had a writ againft the defendant, came to Mr. *Stapleton* an attorney, and told him the defendant defired he would back the writ, and appear for him; and afterwards upon the plaintiff's attorney applying to him he told him he had fent orders to his agent to appear, and he believed he had done it. Whereupon the plaintiff's attorney delivered a declaration, and figned judgment for want of a plea. Upon motion to fet it afide, it appeared the bailiff went of his own accord to Mr. *Stapleton*, without the direction of the defendant, and that Mr. *Stapleton* difcovering this, had countermanded the orders for appearing, and that in fact there was no appearance. But the court refufed to fet it afide, and faid they * would oblige Mr. *Stapleton* to file common bail according to his undertaking, in order to make the proceedings regular, there being no fault in the plaintiff's attorney. *Strange pro quer'.*

Where attorney undertakes to appear, the court will oblige him to do it in all events.

* *Not unlefs attorney had figned undertaking, writing it not fufficient. Loft.* 192, 193. note 2d. ed.

Noke *verſ.* Windham.

Practice.

THE leſſor of the plaintiff being an infant, the court obliged him to name a good plaintiff, who might be anſwerable for coſts (1).

(1) *Anon.* 1 *Wilſ.* 130. *Throgmorton* v. *Smith*, *poſt.* 932. *Birchman* v. *Noright*, 2 *Barnard*, *B. R.* 140. S. C. S. P. *Caſes temp. Hard.* 51. *Thruſtout* v. *Percival*, *Barnes* 193. *anon. Cowp.* 128.

Eden *verſ.* Wills.

The *ſcire facias* in error muſt be returnable as the original proceſs was.
L. Raym. 1417.

AN action was commenced in *C. B.* by writ of privilege, which was returnable at a day certain: after judgment for the plaintiff a writ of error was brought, and a *ſcire facias quare executio non* was taken out returhable at a general return. And upon motion to ſet it aſide, the matter was ſtirred ſeveral times. And after conſideration and ſearch of precedents, the *ſcire facias* was ſet aſide, for that it ought to purſue the nature of the firſt proceſs: and whereas in the common caſe of actions by original in *C. B.* the proceſs upon error in *B. R.* muſt purſue that, and be returnable at a general return; ſo where the proceeding below is by attachment of privilege, which is returnable at a day certain, the proceedings here muſt be returnable in the ſame manner. And a caſe was cited of *Vavaſour* v. *Parker*, *Trin.* 11 *Ann.* (*a*). where it was ſo ruled. *Theſ. Brev.* 121. The writ was quaſhed, but without coſts (1).

(*a*) 19 Vin. Abr. 288. c. 5.

(1) But in *Weſt* v. *Sutton*, where a *ſcire facias* upon a judgment upon an original in *B. R.* was made returnable on a day certain, it was held to be good. 2 *Ld. Raym.* 853.

Courtney *verſ.* Satchwell.

Fort. 380. S. C. In treſpaſs and falſe impriſonment defendant juſtifies under a proceſs quæ eſt eadem &c. and traverſes being guilty *aliter* &c. it is ill on ſpecial demurrer (1).

IN treſpaſs, aſſault, and falſe impriſonment, the defendant juſtifies under a proceſs out of the ſheriff's court in *London*, *quæ eſt eadem*, &c. and traverſes being guilty *aliter vel alio modo*:

(1) *Vide* 5 *Com. Dig.* 457. *Pleader* (G. 12.) 457.

to this the plaintil demurs, and shews for cause, that the traverse is idle, and unnecessary. And upon argument the court were of opinion, that this was ill on a special demurrer, the *quæ est eadem* being a sufficient traverse. *Lutw.* 1457. And so it was held in the case of *Carvil* v. *Manby* (*a*), where on a general demurrer it was allowed to be well enough; but the court said if it had been a special demurrer, it would have been otherwise. *Judicium pro querente.*

(*a*) Fort. 379. 8 Mod. 30. Prec. Reg. 271. S. C.

Lister *verf.* Baxter. [695]

The master cannot hypothecate the ship before the voyage begins.

LISTER being master of a ship that was in distress at sea, put in at *Amsterdam*, and there borrowed 60 *l* of *Baxter* to repair the ship, and hypothecated it for repayment of the money. The money not being paid, *B.* libelled in the admiralty; whereupon a prohibition was moved for, on account of it's being a contract at land; and it not appearing by the words of the contract, that the ship was upon her voyage, it would be presumed she was only to begin her voyage from *Amsterdam.*

But the court was clearly of opinion, there should go no prohibition; it appearing by the libel, that the ship was upon her voyage; and if she was not, it might be pleaded below, which would oust the admiralty court of jurisdiction; the master having no power to hypothecate the ship in port, before she set out upon her voyage (1).

(1) *Justin* v. *Ballam*, 1 *Salk.* 34. *Watkinson* v. *Barnardiston*, 2 *P. Wms.* 367. *Ex parte Shank*, 1 *Atk.* 234. *Buxton* v. *Snee*, 1 *Vez.* 154. *Samson* v. *Bragginton*, *ib.* 443. *Wilkins* v. *Carmichael*, *Doug.* 101.

Sir Thomas Hales *verf.* Taylor.

Enforcing an award by process of contempt is discretionary, and the court will not do it where there are contradictory affidavits as to the performance.

THE plaintiff having brought an action against the defendant for diverting his water, the matter was referred to arbitration, and the arbitrators awarded the defendant to fill up a canal, restore the stream to its former course, and to do several other matters relating to his water-works. The plaintiff afterwards applied to the court for an attachment for non-performance of the award, and read several affidavits to prove it. The defendant on the other side read affidavits, to prove his compliance with the directions of the award. Whereupon the court said, it was discretionary whether they should enforce the award by an attachment; and there being a contrariety of evidence, they

they would not determine it by affidavits, since the plaintiff was not without another remedy, by action upon the award.

Sullivane *verf.* Seagrave.

Ejectment lies *de parte domus* (1).

ERROR of a judgment in ejectment *in R. R. in Ireland de parte domus cognit' per nomen de le Three Kings in A.* And it was objected, that an ejectment would not lie *de parte domus*, and that the sheriff could not know of what part he was to deliver possession, and 2 *Roll. Rep.* 483. 11 *Co. Savill's* case. 4 *Mod.* 166. *Mo.* 702. *Lutw.* 974. *March* 97. *Salk.* 254. were cited.

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But the court was of opinion, it was well enough, the situation of the house being sufficiently described, and the same certainty is never required in an ejectment as in a *præcipe*.

Record well returned from B R. *in Hib.* although *capital' Justic' infra nominat.* omitted. (*a*) Cited ante 316.

Then exception was taken, that the record was not well returned; the writ of error being directed to *William Witched* Chief Justice, and the return is only by *William Witshed* without adding *capital' justic' infra nominat'* (*a*), which *Fortescue* Justice, thought a material objection, and mentioned the case of the *Queen* verf. *Somers* 7 *Annæ*, which was a *certiorari* directed to the justices of the peace of *Oxon*, and the return was by two aldermen, without naming themselves justices. *Sed per* C. J. and *Reynolds* J. (*absente Powys* J.) here are the words *prout interius mihi præcipitur*, which are enough to shew him to be the same person to whom the writ is directed: so the record being well removed, the judgment must be affirmed.

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(1) *Vide Goodtitle* on the demise of *Chifter* v. *Alker* & *Elmer*, 1 *Burr.* 133. *Cottingham* v. *King*, *ib.* 621. *Goodtitle* v. *Walton*, *post.* 834. and the cases there cited.

Case of the Borough of Christ-Church.

No trial at bar before issue joined.

UPON a motion for a trial at bar, which was consented to on both sides, it appeared issue was not joined: and the court refused to grant it, saying it was below the dignity of the court to do it, till they knew whether the issue joined would be a matter of difficulty or not.

Anonymous.

A *Mandamus* was granted on Serjeant *Pengelly*'s motion, to swear in a director of the Amicable Assurance, which is a company created by charter from the crown. Mandamus.

Ludwell *verf.* Hole.

AFTER verdict for the plaintiff, who laid himself to be a Gentleman, in an action for these words, '*You are a cheating old rogue, and have cheated the fatherless and widow.*' The judgment was arrested for want of shewing the defendant to be a trader, or laying any *colloquium* of his trade. 5 *Mod.* 398. 1 *Roll. Ab.* 62. *Hardr.* 8. *Raym.* 62, 169. Words not actionable (1). L. Raym. 1417. 4 Bro. Abr. 491, 493, 494. post. 1169.

(1) *Vide Shurman* v. *Shelleto*, 3 *Burr.* 1688.

* Vat qui tam *verf.* Green. * Wyatt, *n.* to 2d *ed.*

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IN a *qui tam* on the statute of usury, I moved to stay proceedings, till notice given of the plaintiff's place of abode: after the rule was served on the plaintiff's attorney, he sends notice in writing that the plaintiff was in *Switzerland*, and was going on with the action: upon which I moved a second time to stay proceedings, till the plaintiff's return from *Switzerland*, or security given for the costs, which is the reason the common rule is founded upon: And after hearing Mr. *Hussey* for the plaintiff, the court made a rule according to my motion, and security was given for costs (1). Practice. 12 Ann. st. 2. c. 16.

(1) In *Throgmorton* v. *Smith*, 2 *Kely.* 65. S. P. See also *Tashburne* v. *Kirsher*, 1 *Barnard.* 197. *Birchman* v. *Wright*, *Bull. L. N. P.* 111. *Cusack* v. *Jones*, *Say. Law of Costs*, 153. & *Denn. ex dem. Lucas* v. *Fulford*, 2 *Burr.* 1177. where a similar rule was granted in an ejectment brought under the direction of the court of Chancery, though a security for 40*l.* had been already given there for that purpose.

Rig *verſ.* Wilmer.

Aſſignee of a commiſſion may declare on a promiſe to the bankrupt (1).

ACTION by the plaintiff as aſſignee under a commiſſion of bankruptcy; and the declaration was, that the defendant was indebted to the bankrupt, and being ſo indebted he promiſed to pay to the bankrupt; but throughout the whole declaration there was no *aſſumpſit* to the plaintiff the aſſignee.

On demurrer it was inſiſted on by the defendant, that the ſtatute had transferred the promiſe to the aſſignee, and that a promiſe before made to the bankrupt was afterwards in point of law a promiſe to the aſſignee, and ought to have been declared on as ſuch.

Sed per curiam, What reaſon is there to differ this from the common caſe of an action by an executor where you always declare on a promiſe to the teſtator, and yet the promiſe is as ſtrongly transferred to the executor, as it is here to the aſſignee. Judgment for the plaintiff.

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(1) *Parkins* v. *Wollaſton*, 6 *Mod.* 131. S. P. *per Holt* C. J. *Middleton* v. *Whitebread*, 2 *Show.* 238.

Foot *verſ.* Prowſe. *Ante* 625.

A peremptory mandamus may go before any formal judgment.

THE judgment of the Exchequer Chamber, whereby the judgment given in *B. R. pro defendente* was reverſed, being now affirmed in parliament, the plaintiff came and moved for a peremptory *mandamus*: inſiſting, that he had now falſified the return, and conſequently ſet aſide the defendant's excuſe. To which it was objected, that no peremptory *mandamus* ought to go, unleſs beſides the reverſal of the judgment given for the defendant there had been alſo a new judgment given for the plaintiff; that a peremptory *mandamus* is a judicial writ, and muſt be

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founded upon ſome judgment eſtabliſhing the party's right that applies for it. *Par. Ca. Philips* v. *Bury*, *Salk.* 431. 2 *Cro.* 206. *Yelv.* 74. 2 *Vent.* 295. *Paſ.* 10 *Ann.* *Lidd* v. *Rodd*, *Trin.* 7 *Ann.* (*a*) *Hicks* v. *Sherburn.*

Salk. 428. (*a*) 1 Bro. P. C. 328.

To which it was anſwered, that here was every thing done by the plaintiff that was poſſible for him to do, for he can have no new judgment, the Exchequer Chamber and Houſe of Lords being confined only to reverſe or affirm.

And the whole court were of opinion, that a peremptory *mandamus* ought to go; for this was not a judicial writ founded upon the record, but is a mandatory writ, which the court always grants, when they are satisfied of the parties' right: the reversal of our judgment is declaring the opinion of the superior court, that the plaintiff had a right; and there is no occasion for any new judgment. We every day grant peremptory *mandamus's* on producing the *postea*; which shews a formal judgment is not necessary. A peremptory *mandamus* was awarded.

Dominus Rex *vers.* Inhabitantes de Leofield.

AN order of removal whereby *J. S.* was adjudged *likely to become chargeable*, without saying *to the parish from whence removed*, was confirmed (1). Poor.

(1) *Vide ante* 142, 393.

Dominus Rex *vers.* Warre et al'.

UPON demurrer to an indictment, the caption appeared to be, at a sessions held *ad festum Epiphanii* instead of *Epiphaniæ*: and it was insisted *pro defendente*, that this was a different time from that prescribed in the statute, for *Epiphanius* is in the *Roman* calendar, and was a bishop of *Salamis* in the time of the Emperor *Theodosius*: and the court held it ill, and gave judgment for the defendant.

2 Sess. Ca. p. 5. no. 9. S. C. Caption *ad festum Epiphanii* ill. (1).

(1) *Hawk. P. C. ch.* 25. *sect.* 127, 362. *Et vide Rex* v. *Fearnley*, 1 *Term Rep.* 316.

Mr. Delamotte's case.

HE was a justice of peace in *Kent*, and lived at *Black-heath* and in *London*. And being appointed constable in *London*, Serjeant *Chesbyre* moved for a writ of privilege, and cited *Cro. Car.* 585. But the court denied it, saying they had nothing to do with it, but the proper method was under the statute *Car.* 2. to apply to the sessions.

1 Sess. Ca. p. 344. pl. 271. S. C. No writ of privilege against a justice's being constable. 13 & 14 Car. 2. c. 12. § 15.

2 Haw. P. C. ch. 10. § 39, 40, 41. p. 99.

Sisney *verʃ.* Nevinson.

If in an action upon a bond defendant pays money into court under 4 & 5 Ann. c. 16. ſ. 13. he ſhall not pay the coſts incurred, for the ſame cauſe in other courts (1).

THE plaintiff had brought an action of debt upon a bond againſt the defendant as adminiſtratrix; and filed a bill in equity to diſcover aſſets; and had inſtituted a ſuit in the ſpiritual court, to oblige her to give in an inventory. After judgment for the plaintiff in the action, a writ of error was brought *in B. R.* and the judgment reverſed: then the plaintiff brought a new action *in B. R.* And the defendant moved to ſtay proceedings, upon the act for amendment of the law, on paying principal, intereſt and coſts. And now upon motion for the court's direction to the maſter in taxing the coſts, it was inſiſted for the plaintiff, that the defendant ought to pay the whole coſts of the firſt ſuit, the proceedings in Chancery, and the ſpiritual court, and the caſe of *Merril* v. *Joycelyn*, *Trin.* 13 *Ann.* (a) was mentioned for this purpoſe.

(a) Caſ. Temp. Hard. 368.

Sed per cur', We have nothing to do to order coſts for proceedings in another court, which has a power to award coſts, if the party is intitled to them; and as to the judgment, that is reverſed, there is no reaſon why the defendant ſhould pay for the error and miſtake of the plaintiff. We are of opinion, the proceedings in this cauſe muſt be ſtayed on payment of the coſts of this ſuit (1).

(1) *Saltern* v. *Wynne*, *poſt.* 1072. *Lock* v. *Shermer*, *Caſ. temp. Hard.* 116. *contra.*

Dominus Rex *verʃ.* How.

1 Seſſ. Ca. p. 31. no. 35. S. C. Indictment for words muſt ſpecify what they were (1). *Vide* the reſolution in Dr. *Sacheverell's* caſe. St. Tri. viii. 566.

INdictment againſt the defendant, for that he *quendam Nich'um Carew*, *Baronettum*, being a juſtice of peace in the execution of his office, *per diverſa ſcandaloſa*, *minacia et contemptuoſa verba abuſus fuit*, *et ipſum in executione officii ſui prædicti vi et armis illicite retardavit.* Upon demurrer to this indictment, it was objected by Serjeant *Darnall*, that it was too general, and that the words ought to be ſet out, that the court may judge whether they are indictable or not, according to the late caſes of convictions for curſing and ſwearing, where the court has required the oaths to be ſet out.

(1) 2 *Hawk. ch.* 25. *ſect.* 57. 331. 1 *Roll.* 79.

(2) *Rex* v. *Popplewell*, *ante* 686.

Strange

Strange contra admitted the indictment to be bad as to the words, but infifted that it was good as to the obftructing the juftice in the execution of his office: and if any part of it be well laid, there fhall be judgment for the King. Juftices are indictable for neglecting their duty, and it is but reafonable to give them the fame remedy againft the obftructors. *Salk.* 380.

Et per curiam, If any part of the indictment was good, we fhould not give judgment for the defendant. But this is bad *in toto*. *Retardavit* will hardly warrant calling this an obftruction; but if it would, furely fome act or other fhould be fet out. *Judicium pro defendente*. [700] 2 Haw. P. C. ch. 25. fect. 59, 322. fect. 74, 332.

The King *againft* the Inhabitants of Saint Mary the Virgin in Marlborough.

AN order was made upon the 33 *Eliz.* for a neighbouring parifh to contribute *fo long as we the faid juftices fhall think fit*. *Et per curiam*, It muft be quafhed, for the difcretion that is left in the juftices is as to the *quantum*, and not as to the duration of the contribution. 2 Sefs. Ca. p. 52. no. 55. 16 Vin. 416. 8 Mod. 344. Fol. 59. 3 Burn. Juft. 692. S. C.

Dominus Rex *verf.* Travers.

At Kingfton Lent *Affizes* 1726. coram Raymond *C. J. de B. R.*

THE defendant was indicted the laft fummer Affizes, for a rape upon the body of a child, then little more than fix years old. And becaufe the Lord Chief Baron *Gilbert* refufed to admit the child as an evidence againft him, he was acquitted. What age the law will allow an infant to be a witnefs at. No diftinction in this refpect between capital and leffer offences.

But at the fame Affizes an indictment was found againft him for an affault with an intent to ravifh the faid child. And this indictment coming on now to be tried before *Raymond* C. J. the fame objection was now taken by *Comyns* and *Darnall* Serjeants, *viz.* that the girl being now but feven years of age, could not be a witnefs: they infifted that it had formerly been held, that none under twelve years of age could be admitted to be a witnefs, and faid that a child of fix or feven years of age, in point of reafon and underftanding, ought to be confidered as a lunatick or madman.

On the other fide it was faid, that in capital cafes, which concerned life, this objection might be allowed; but in cafes of mifdemeanor

misdemeanor only, as this was, such a witness might be admitted: they insisted that the objection went only to the credit of the witness; and *Hale's P. C.* says, that the examination of one of the age of nine years has been admitted: and a case at the *Old Bailey* 1698. was cited, where upon such an indictment as this, *Ward* Chief Baron admitted one to be a witness, who was under [701] the age of ten years, after he child had been examined about the nature of an oath, and had given a reasonable account of it.

But *Raymond* C. J. held, that there was no difference betwixt offences capital and lesser offences, in this respect. And that a person who could not be a witness in the one case, could not in the other. The reason why the law prohibits the evidence of a child so young is, because the child cannot be presumed to distinguish betwixt right and wrong: no person has ever been admitted as a witness under the age of nine years, and very seldom under ten. At the *Old Bailey* in 1704. this point was thoroughly debated in the case of one *Steward*, who was indicted upon two indictments for rapes upon children. The first was a child of ten years and ten months, and yet that child was not admitted as a witness, before other evidence was given of strong circumstances, as to the guilt of the defendant, and before the child had given a good account of the nature of an oath. The second indictment against *Steward* was attempted to be maintained by the evidence of a child of between six and seven years of age: but it was unanimously agreed, that a child so young could not be admitted to be an evidence, and the child's testimony was rejected, without inqu ring into any circumstances to give it credit. And it was merely upon the authority of *Hale's P. C.* where it is said, that a child of ten years of age may be a witness, that the other child of that age was admitted to be a witness in the first indictment. And in the present case, the child was refused to be admitted a witness. And there not being evidence sufficient without her, the defendant was acquitted (1).

(1) *Sed vide Brazier's* case, where an infant of 5 years old was held a good witness by all the judges, *she appearing to be acquainted with the nature of the obligation of an oath.* 12 *Ap.* 1779. *Bull. L. N. P.* 293. ed. 1790.

Bredon qui tam *vers.* Harman.

At Guildhall coram Eyre *C. J.* de C. B.

A former recovery not to be given in evidence on *nil debet* in a *qui tam.* *Strange post.*

ACTION *qui tam* for not registering articles of apprenticeship according to the stamp act: the defendant pleaded *nil debet*: and upon the trial he offered in evidence a record of a recovery against

against him for the same forfeiture by another person, and so endeavoured to discharge himself by this under the plea of *nil debet*. And it was insisted for him, that if it appeared, that there was a recovery against him by another person for the same forfeiture, he was thereby discharged against all men, and owed nothing upon that account, and therefore it was very proper to give this record in evidence upon *nil debet*.

But *Eyre* C. J. denied this record to be given in evidence, and said the defendant ought to have pleaded it, if he would take advantage of it; for if it had been pleaded, the plaintiff would have been at liberty to have replied *nul tiel record*, or that it was a recovery by fraud to defeat a real prosecutor, which he could not be prepared to shew upon this issue. [702]

Dominus Rex *verf.* Brotherton.

INDICTMENT for exercising the trade of a butcher on a *Sunday*. And exception was taken, that it was not laid to be *contra formam statuti*, and it was no offence at common law. But the court refused to quash it, and put the defendant to demur; and afterwards upon demurrer judgment was given for the defendant (1).

2 Sess. Ca. p. 224. no. 157. S. C.

Selling meat on a *Sunday* no offence at common law.

(1) *Vide Faulkner's* case, *Saund.* 249. S. P.

Trinity Term

12 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Littleton Powys, *Knt.*
Sir John Fortescue Aland, *Knt.* } *Justices.*
James Reynolds, *Esq*;
Sir Philip Yorke, *Knt. Attorney General.*
Charles Talbot, *Esq*; *Solicitor General.*

Dominus Rex *vers.* Rhodes.

Pending a suit in the spiritual court, touching the validity of a will, an indictment for forging it ought not to be tried. Cited in 1 Wilf. 75. and in St. Tr. xi. 213. 219. 233. Vide post. 776.

THE defendant exhibited a will in *Doctors Commons* as executor, and demanded probate; after a long contest there, it was determined in favour of the will; and upon appeal to the Delegates the sentence was confirmed.

Afterwards the parties who had been concerned in cooking up the will, fell out amongst themselves about the division of the estate; and thereupon it came out, that the will was forged, and upon full affidavits of the forgery a commission of review (which it was agreed was the only method to bring the matter over again) was granted by the Lords Justices; and an indictment was also found for the forgery, and stood ready for trial in *B. R.* Upon motion for a *habeas corpus ad testificandum* the Chief Justice declared, that he would not try the cause. For there being yet a sentence subsisting in favour of the will, and the validity of that being now put under a proper examination; he did not think it fitting to determine the property by an indictment, which would come on more properly after the sentence was reversed.

Dominus Rex *verf.* Davie.

ORDER of feffions for difcharging an apprentice was quafhed, the only reafon given for the difcharge being that the mafter declared in open court he would not take him again (1).

Apprentice not to be difcharged without a reafon. 1 Seff. Ca. p. 282. No. 221. S. C.

It was agreed to be a point not now to be difputed, but that the feffions had an original jurifdiction to difcharge apprentices (2).

(1) *Rex* v. *Eaftman*, *poft*. 1013. S. P.

(2) *Rex* v. *Gill*, *ante* 142. S. P.

Dominus Rex *verf.* Smith.

THE defendant was convicted on an indictment for making great noifes in the night with a fpeaking trumpet, to the difturbance of the neighbourhood: which the court held to be a nufance, and fined the defendant 5 *l*.

Nufance. 2 Seff. Ca. p. 6. No. 10. S. C.

Dominus Rex *verf.* Lewis.

INDICTMENT in the grand feffions of *Anglefea*, for embracery. And it was moved *ex parte def'* for a *certiorari*. It was admitted, that in capital cafes the *certiorari* lay by the 26 *H*. 8. *c*. 6. § 6. But it was contended for the profecutor, that in cafes of mifdemeanor it had never been granted; of which the court would advife. And at another day feveral precedents were produced, and *pofteas*, where the indictment removed from the grand feffions had been fent down to be tried in an *Englifh* county, and returned up to *B. R.* therefore in this cafe there being an affidavit, to induce a fufpicion, that a fair trial could not be had in *Wales*, a *certiorari* was granted (1).

Certiorari lies to *Wales* on indictment for mifdemeanor. 1 Seff. Ca. p. 312. No. 244.

N. B. The affidavit was intitled *Rex* v. *Lewis*. And it was objected there was no fuch caufe in this court. But the court faid it was enough that there was a caufe below between the *King* and *Lewis*, fo the affidavit was read. At another day *inter*

How affidavits muft be intitled.

(1) *Vide Rex* v. *Cowle*, 2 *Burr*. 834. 861. *Rex* v. *Inhabitants of Clace*, 4 *Burr*. 2456. and the cafes there cited. *Rex* v. *Griffith*, 3 *Term Rep*. 658. and the cafes in the note.

Regem *et* Jones.

Where there is a rule to shew cause why an information should not be granted, the affidavits should be intitled as between the King and the person moved against. (1)

[*705]

THE affidavits on which an information was moved for had no title (which was agreed to be right) but the affidavits *pro def'* on shewing cause were intitled. *Rex* v. *Jones*. And upon objection to the reading them, the court said, that there being a rule * in *B. R.* to shew cause why there should not be an information, that there was a proceeeding in court between the *King* and *Jones*, and warranted the intitling the affidavits in that manner.

(1) " *In the case of Rex* v. *Robinson, Esq. Trin.* 5 *Geo.* 3. *B. R.* " *the affidavits produced by the defendant, in shewing cause, were* " *not intitled. Mr. Dunning objected to the reading of them. But* " *the court held that they might be* " *intitled or not, on shewing cause,* " *and the affidavits were read, and* " *the rule discharged.*" *MSS.* *Rex* v. *Harrison*, 6 *Term Rep.* 60. agrees with this case of *Rex* v. *Robinson*; and the present case does not contradict either, as it goes only to say, that intitling the affidavits shall not *prevent* their being read, in shewing cause against the rule *nisi* —But *Rex* v. *Pierson*, *Andr.* 313. and *Bevan* v. *Bevan*, 3 *Term Rep.* 601, are *contra*.

Onslow *vers.* Booth.

Plea of privilege set aside. Fort. 341. Say. 19. S. C.

A Plea of privilege of clerk to a prothonotary in *C. B.* was set aside, the affidavit annext to it being *that this is a true plea*, and not *that the plea is true*, the statute requiring the affidavit should establish the fact, and not the legality of the plea.

Braceby *v.* Dalton.

Practice.

IN an action upon the case Mr. *Wynne* moved on affidavit that the defendant did not know the plaintiff, that the attorney for the plaintiff might give an account who his client was, and where he lived. But the court refused it, saying it had never been done but in a *qui tam* (1).

(1) *Quære vide Gynne* v. *Kerby*, and the note *ante* 402, *Short* v. *King*, *ante* 681.

Powel *vers.* Gay.

Practice.

IT was settled, that if the defendant craves *oyer* of any thing whereof he is intitled to have *oyer*, and it is not delivered in time; he shall have so many days to plead after the rules are out, as he demanded *oyer* before the rules were out (1).

(1) So shall the plaintiff where the defendant makes a profert. *Imp. Pract. K. B.* 243.

Frontin *verf.* Small.

IN covenant, the plaintiff declares, that by deed made between her as attorney for *James Frontin* on the one part, and the defendant on the other part, fhe demifed a houfe to the defendant, and that he covenanted to pay the yearly rent of 60*l.* to *James Frontin*, and then affigns a breach in non-payment of rent, *ad damnum* of the plaintiff, who was the attorney. Where a warrant of attorney is given to execute a deed, it muft be executed in the name of the principal. The attorney cannot maintain an action upon it in his own name. L. Raym. 1418. S. C.

Demurrer inde, and *Strange pro defendente* objected, that this is a void leafe, and that no action can be maintained upon it, efpecially by the plaintiff who was but the attorney, and to whom the rent is not referved: neither is it fo much as a covenant *with the plaintiff*, but only generally *quod convenit* to pay the rent to *James Frontin*. The power is not purfued by a leafe in the name of the attorney, for it ought to have been in the name of the principal. 9 *Co.* 76, 77. *Combe*'s cafe is exprefs, "If at- [706] "tornies have power to make leafes by indenture for years, they "cannot makes the indentures in their own names, but in the "name of him who gave the warrant of attorney;" and 1 *Roll. Abr.* 330. 501. *Godb.* 389. *Mo.* 71. it is faid fuch leafes are void. A warrant of attorney in the nature of it is only giving another a power to fet my name in my abfence, but not to enable him to act as owner of the eftate.

Reeve contra infifted, that the agreement that one fhall procure an entry and enjoyment, and the other fhall pay the rent, may be good, though the deed be void fo as to pafs an intereft in the land: and the word *dimifit* is a covenant, upon which an action will lie. 4 *Co. Noaks*'s cafe. And a leafe may be good referving rent to a ftranger, who is no party to the deed; and fo is 1 *Mod.* 113. *Et per curiam*, No doubt but in a good leafe the rent may be fo referved, and that *dimifit* will amount to a covenant; but then that muft be where the deed is valid, as this is not: and if on the one hand it be void fo as to pafs an intereft in the land, it is but juft on the other hand that it fhould be void as to the refervation of rent: efpecially in this cafe, where the covenant is not *with the plaintiff*, nor the rent referved to her. Judgment for the defendant.

Chadwick *verf.* Allen.

UPON demurrer to a declaration on the following note, it was held to be a note within the ftatute; "I do acknow- "ledge that Sir *Andrew Chadwick* has delivered me all the

"bonds and notes for which 400*l.* were paid him on account "of Colonel *Synge*, and that Sir *Andrew* delivered me Major "*Graham*'s receipt and bill on me for 10*l.* which 10*l.* and "15*l.* 5*s.* balance due to Sir *Andrew*, I am ſtill indebted, "and do promiſe to pay." *Judicium pro quer.' Strange pro defendente.*

Manwairing *verſ.* Sands.

In Middleſex coram Raymond *C. J.* de B. R.

Huſband not chargeable for goods ſold to adulterous wife. Salk. 116.

IN an action againſt the huſband for a laced head ſold to the wife; it was proved, that the wife lived from her huſband in adultery, and that ſhe told the plaintiff ſhe had a huſband, but that ſignified nothing, for ſhe would pay him herſelf: the Chief Juſtice held the defendant not chargeable, and ſaid he [707] ſhould have ruled it ſo, if there had been no actual notice, which only ſtrengthened the caſe (1). *Strange pro defendente.*

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(1) *Morris* v. *Martin*, *ante* 647. S. P. See *Bolton* v. *Prentice*, *poſt.* 1214.

Pepys *verſ.* Sir John Lambert.

At Guildhall coram Raymond *C. J.*

Within what time a note ought to be demanded.

THE third indorſee of a promiſſory note kept it from the firſt of *November* to the ſeventh of *January* without receiving it of the maker of the note: and in an action againſt the firſt indorſee, without notice, the plaintiff was nonſuited for his neglect. *Strange pro querente* (1).

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(1) *Vide Sydebottom* v. *Smith*, *ante* 643. *Coleman* v. *Sayer*, *poſt.* 829. *Metcalfe* v. *Hall*, *B. R.* *T* 22 *G.* 3. *B. L. N. P.* 275. *Doug.* 515. *Hill* v. *Lewis*, *Salk.* 132. *Chamberlayne* v. *Delaryſe*, *C. B. T.* 7 *Geo.* 3. *B. L. N. P.* 277. *Tindal* v. *Browne*, 1 *Term Rep.* 167.

Dominus Rex *verſ.* Edwards.

INDICTMENT for conſpiring to marry a poor perſon ſettled in *A.* to a perſon ſettled in *B.* in order to bring a charge upon the pariſh of *B.* And on demurrer *judicium pro defendente*, becauſe not an offence indictable (1). *Vide Salk.* 174.

Indictment *ne giſt.* And. 174. 8 Mod. 320. 1 Seſſ. Ca. 336. c. 265. S. C.

(1) *Vide Rex* v. *Tarrant*, 4 *Burr.* 2106. Where an information was granted againſt an overſeer for this offence.

Wheeler *verſ.* Thompſon.

ON a motion for a prohibition, it was held that a carpenter may ſue for wages in the Admiralty. 2 *Vent.* 181. *Salk.* 33. 1 *Mod.* 93.

Ship carpenter may ſue in the Admiralty for wages.

Jenkins *verſ.* Purcel.

At Guildhall coram Raymond *C. J.*

WHILST the jury were ſwearing, the defendant's counſel called for the record, and finding a miſtake in it, ſaid they would make no defence. The plaintiff's counſel upon this, in order to avoid a nonſuit, and to ſave the coſts, refuſed to pray a *tales*; and though twelve had been ſworn, yet there having been no actual prayer of a *tales*, the cauſe was ſuffered to remain for want of jurors.

Practice at *niſi prius.*

Turner *verſ.* Turner. [708]

In Canc. coram King *Chancellor*, 14*th of* May.

THE plaintiff being an infant, brings a bill in this court, by his *prochein amy*, to diſcover whether a will was cancelled by the defendant after the death of the teſtator, or by the teſtator himſelf. And upon the hearing, the court directed an iſſue at law, to try this point, and upon the trial of that iſſue, a verdict was found for the defendant.

Infant pays no coſts on a bill filed by the *prochein amy.* 2 Will. Rep. 297. Sel. Caſ. in Cha. 49. 2 Eq. Ca. Ab. 238. pl. 18.

Upon the day of trial of this cauſe the *prochein amy* dies, and within a ſhort time afterwards the infant comes of age, but does not proceed any further in the ſuit.

 The

The defendant brings on the cauſe upon the equity reſerved, and the plaintiff's bill was diſmiſſed with coſts (1).

Upon which the plaintiff obtained a re-hearing as to the point of coſts. And for the plaintiff it was argued by *Talbot* and *Cowper*, that any perſon might bring a bill in this court in the name of an infant, which the infant could not diſcover whilſt under age: [illegible] it would therefore be very hard to make an infant pay coſts in a [illegible]h might be commenced without his conſent; and [illegible] never been the practice, unleſs the infant avowed the ſuit after he came of age, which made it his own act.

That the *prochein amy* was the perſon only relied upon for coſts; and if at any time it appeared to the court, that he was not reſponſible for this purpoſe, the court upon motion would order a new one to be named, that was ſo (2): and in caſes where it is neceſſary to examine the *prochein amy* as a witneſs in the cauſe, it can never be done till he is diſcharged from being *prochein amy*, and a new one named; becauſe of his intereſt in the cauſe, in being ſubject to coſts.

That they could not find one inſtance, where an infant under theſe circumſtances ever paid coſts: that they had ſearched the *ſubpœna* office, and found, that wherever an infant's bill was diſmiſſed with coſts generally, that the *ſubpœna* for coſts was always made out againſt the *prochein amy*; from whence they argued, that the practice was to make him only liable.

[709] A *feme covert* when ſhe ſues by *prochein amy* may be ſubject to coſts, but an infant is not; for a *feme covert* may at any time diſavow the ſuit, which an infant cannot: and this they ſaid was the diſtinction; and therefore inſiſted, that the plaintiff, in regard he had not proſecuted the ſuit after he attained his full age, ſhould not be made ſubjects to coſts.

For the defendant it was argued by *Lutwyche* and *Mead*, that the infant and *prochein amy* were both liable, and ought to be ſo, otherwiſe the infant might be as vexatious as he pleaſed: at common law the judgment is always entered againſt the infant, and the execution follows the judgment; ſo that at law the in-

(1) *Vide* the report in *Peere Williams*.

(2) *Quære vide Squirrel* v. *Squirrel*, 17 *Dec.* 1791. *coram* Lord C. *Thurlow*, 2 *Cox's P. Wms.* 296. n. (1).

fant

ſant here is liable to coſts; and there being in this caſe both coſts at law and in equity, a court of equity will not in ſuch caſes take from the defendant the remedy he has at law. It was admitted, that they knew of no precedent in this court, where the infant paid coſts; and therefore they would argue from caſes at law, which they ſaid were equally founded upon reaſon as caſes in equity: and the reaſon of the common law in ſubjecting infants to coſts, was in reſpect of their intereſt in the matter in controverſy. The *prochein amy* has not an abſolute power to carry on a ſuit without an infant's conſent; for upon application to the court on the behalf of the infant, ſuggeſting that the ſuit is not for his benefit, the court will refer it to a Maſter, and if he reports it ſo, the court will ſtop the ſuit. The caſe of Lord *Dudley* was mentioned, where an infant would have controverted an account before a Maſter: but the court would not permit him to do it, till he had given ſecurity to anſwer coſts; from which it was inferred, that an infant ought to be made liable to anſwer coſts.

King Lord Chancellor. At common law no coſts were given either to plaintiff or defendant; but the plaintiff found pledges *de proſequendo*, and in caſe it was found againſt him, he was amerced *pro falſo clamore ſuo*.

Infants found no pledges at common law. The ſtatute of *Glouceſter* was the firſt ſtatute which gave coſts to demandants in real actions, and the power for infants to ſue by *prochein amy* was firſt introduced by the ſtatute of *Weſtminſter* 2. It was made general, and *Coke* in his commentary upon theſe ſtatutes ſays, that both guardian and *prochein amy* ought to be admitted by the court, and that no one can have a teſtamentary guardian for this purpoſe. I think it a proper power lodged in the court, that they may have reſponſible perſons; for at common law, if the guardian loſt the infants' land by miſpleading, the infant could not falſify the judgment; but a writ of deceit lay to recover in damages againſt the guardian. [710] I do not find that any caſe has been cited, where an infant plaintiff has been obliged to pay coſts either at law or in equity: and in *Cro. Eliz.* 33. *Grave* v. *Grave*, an infant brought treſpaſs by guardian, and was nonſuited; yet the court would not charge him with coſts. And in another caſe 1 *Bulſt.* 109. the court ſeemed to be of the ſame opinion. Vide 1 Bulſt. 189.

And the Chancellor having enquired, what was the practice of the regiſter, who ſaid he had never known an infant liable in that court; he diſmiſſed the bill without coſts in equity, but left the defendant to recover at law, as he could.

Keilway *verf.* Keilway.

Coram King *Chancellor*, 19 May 1726.

How the eftate fhall be diftributed where there is a wife, a mother and brothers, but no children.
2 Will. Rep, 344. more full.
Gilb. Rep. 189, 190.
2 Eq. Ca. Ab. 441. pl. 47. 442. pl. 48.
1 Eq. Ab. 253.

R. *Keilway* died inteftate poffeffed of a confiderable perfonal eftate, and without iffue, leaving a wife, and feveral brothers and fifters, and his mother living.

The wife under the ftatute of *Car*. 2. takes a moiety; and a queftion arifing upon the ftatute 1 *Jac*. 2. *c*. 17. how the other moiety fhould be diftributed, whether the mother fhould have the whole, or only a diftributory fhare with the brothers and fifters, and to have the opinion of the court, a bill was brought; and upon hearing the Lord Chancellor was clearly of opinion, and decreed, that the mother fhould have no more than a fhare of the other moiety in common with the brothers and fifters of the inteftate (1).

(1) *Stanley* v. *Stanley*, 1 *Atk*. 455. S. P. upon the authority of this cafe.

Hill *verf.* Bateman et al'.

Coram Raymond, *Chief Juftice*, *at* Weftminfter.

Trefpafs and falfe imprifonment lies againft a juftice for committing upon a conviction for deftroying game, where there was no attempt to diftrain firft.
1 Seff. Ca. p. 344. No. 270. p. 371. No. 297. S. C.

THE defendant *Bateman*, being a juftice of peace, had convicted the plaintiff for deftroying game, and though (as it was proved) the plaintiff had effects of his own which might have been diftrained, which were fufficient to anfwer the penalty he had incurred, yet the defendant fent him immediately to *Bridewell*, without endeavouring to levy the penalty upon his goods; and an action of trefpafs and falfe imprifonment being brought againft *Bateman* for this commitment, the Chief Juftice was of opinion, that the action well lay (1).

Warrant a fufficient juftification to a conftable in a matter within the juftices' jurifdiction, fecus where it is plainly out of it.
24 Geo. 2. c. 44.

The other defendant was the conftable, who had executed this warrant of commitment; and as to him it was agreed, that the warrant was a fufficient juftification, it being in a matter within the jurifdiction of the juftice of peace: but if a juftice of peace makes a warrant in a cafe which is plainly out of his ju-

(1) *Vide Morgan* v. *Hughes*, 2 *Term Rep*. 225.

rifdiction,

risdiction, such warrant is no justification to a constable. See 24 *Geo.* 2. *c.* 44. (2).

And it was agreed, that where actions of this kind are brought against justices of peace, they are obliged to shew the regularity of their convictions; and the informations, &c. laid before them upon which their convictions are grounded, must be produced and proved in court (3). In these actions justices must shew th regular proceedings.

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(2) *Vide Shergold* v. *Holloway*, *post.* 1002. 4 *Com. Dig.* tit. *Imprisonment*, (H. 9.) *p.* 375. 5 *Com. Dig.* tit. *Pleader*, (3 M. 22.) (3 M. 23.) *p.* 796. So the officer in justifying himself under a warrant, must shew that he acted in obedience thereto. *Money* v. *Leach*, 3 *Burr.* 1742. *Lawson* v. *Clark*, cited *ib.* 1761. 1767.

(3) *Vide* the cases cited in *Crips* v. *Durden*, *Cowp.* 642.

Dominus Rex *vers.* Chipp.

THE defendant was convicted upon the statute 4 & 5 *W.* & *M.* *c.* 23. for destroying game; not being a person duly qualified. 4 & 5 W. & M. c. 23.

If the information set forth in a conviction for killing game, states the defendant to be an inferior tradesman, without saying that he was a dissolute person, is sufficient.

It need no state that defendant did *unlawfully* hunt, but it is otherwise in a conviction for deer stealing.

It is set forth that the information was given to *a justice of the peace*, it need not say *adtunc* a justice. 1 Sess. Ca. p. 372. pl. 298.

Filmer for the defendant took several exceptions to the conviction.

1. That the information, which was set forth in the conviction, was insufficient to warrant the conviction; for the information only recited that he was an *inferior tradesman*, but did not shew that he had *wasted his substance*, or that he was a *dissolute person*, which are the words of the statute; and therefore it did not appear by this conviction, that the defendant was such a person as was intended by the statute, for he might be an *inferior tradesman*, and yet have a sufficient estate to qualify him to hunt, &c.

2. That it was not any where set forth in the conviction, that the defendant did *unlawfully hunt*; and for any thing which appears in this conviction, the defendant might have bought the hare; and have hunted and killed it in his own yard, which would have been lawful.

3. That the conviction set forth, that information was given to such an one *justice of peace*, but did not say *adtunc* a justice; and he might be a justice at present, and not at the time of the information.

 But

But the court over-ruled all the exceptions; and to the first they said, that the statute was in the disjunctive, *viz. inferior tradesman or dissolute person*; and therefore saying that the defendant was either was sufficient.

[712] To the second, the court said, that the statutes forbid such persons as the defendant to *hunt at all*, and made it criminal for such persons to *hunt* generally. And in this statute there is no distinction betwixt *lawful* and *unlawful hunting*, as there is in the statute against deer stealers; and they agreed, that in a conviction for deer stealing, it must be set forth, that the defendant did *unlawfully hunt*; but in the present case it need not, because there is no such distinction.

To the third exception the court said, that the conviction set forth, that information was made to such an one *existen' un' justic'*, *&c.* which must be intended, that he was one at that time, and was sufficient without saying *adtunc*.

And so all the exceptions were over-ruled, and the conviction confirmed.

Dawson et ux' *vers.* Myer Mil'.

In the Exchequer Chamber.

What are mutual covenants. 7 Geo. II. 2. c. 1.

A Writ of error was brought in the Exchequer Chamber upon a judgment in *B. R.* in an action of covenant, in which the plaintiff declared, that in consideration of 730 *l.* 10 *s.* to be paid by the defendant, he (the plaintiff) covenanted on or before the 25 *March* then next, to transfer the produce of 634 *l.* 7 *s.* 6 *d* in lottery annuities subscribed by the plaintiff, and that the defendant covenanted to accept and pay; and the plaintiff set forth, that the company allowed 173 *l.* 16 *s.* stock upon the said annuities, and then sets forth, that he made a tender thereof to the defendant upon the day, and that the defendant refused to accept.

The defendant pleaded double, *viz.* that there was no tender, and that the contract was not registred. The plaintiff replied that the contract was duly registred, and offered an issue, to which the defendant demurred; and as to the defendant's plea that the plaintiff made no tender the plaintiff demurred.

And upon joinder in demurrer, the court of *B. R.* gave judgment for the plaintiff; for they said, that there were mutual covenants,

venants, *viz.* an exprefs covenant from the defendant to pay the plaintiff 730 *l.* 10 *s.* and then a diftinct covenant from the plaintiff to transfer the produce of the annuities to the defendant; and the covenants therefore being mutual, they held that the tender was out of the cafe, and the plaintiff was not obliged to [713] anfwer it; for if the plaintiff did not tender, the defendant had his remedy againft him for not doing it.

A writ of error being now brought upon this judgment in the Exchequer Chamber, *Eyre* Chief Juftice of the Common Pleas, *Gilbert* Chief Baron, *Price*, *Page* and *Hale*, Barons, and *Denton* Juftice, were unanimoufly of opinion, that the judgment of *B. R.* was right, and they affirmed it accordingly.

Fazakerley was of counfel for the plaintiff in error, but he not attending there was no argument.

And *Strange*, who was ready to argue it for the defendant in error, only opened the cafe, becaufe the court were clearly of opinion for his client upon the firft opening. But the cafes upon which he relied as authorities were thefe.

Blackwell v. *Nafh*, *Mich.* 9 *Geo. ante* 535. which was a covenant by the plaintiff to transfer ftock to the defendant, and the defendant *in confideratione præmiffor'* covenanted to accept and pay for it; and the court held that the words *in confideratione præmiffor'* implied the covenant on the other fide to transfer; and were held to be mutual covenants, and judgment *pro quer'*, which was affirmed in the Exchequer Chamber. 1 *Saund.* 319. *Pordage* v. *Cole*.

The cafe of *Wyvil* v. *Stapleton*, *ante* 615. which was affirmed in the Houfe of Lords, was to pay *proinde adtunc* at the time of the tender; which is different from this cafe, for the defendant's covenant is, to pay fo much abfolutely in fatisfaction for the ftock. The defendant here covenants to do two diftinct acts, 1. to accept; 2. to pay; here is no *proinde*; and the words *in confideratione præmiffor'* relate only to the covenant on the other fide to transfer, and not to the actual transferring.

If the covenant of the defendant *ad idem tempus folvere* is to be confined to his acceptance, then it gives him the liberty of avoiding one contract by the breach of the other. In the cafe of *Wyvil* v. *Stapleton* there were not the words *ad idem tempus*, and thofe words in the prefent cafe are to be conftrued to be the time the defendant *agreed to accept the ftock*, and not the time the plaintiff *does actually transfer*.

He

He had another exception to the defendant's plea, which was this; by the contract the plaintiff was to transfer the produce of the said annuities, with all dividends, profits, *&c.* and the plea only offers an issue as to the produce of the stock. So that it is putting that in issue, which if found for the plaintiff, will not establish the performance of the whole agreement on his part. This was as immaterial as the case of payment before the day; which has been often held ill, if found for the plaintiff. *Trin.* 13 *Ann. B. R. Merril* v. *Jocelyn.* So in *Hob.* 113. in debt upon an obligation for the payment of 10*l.* 10*s.* the defendant pleaded payment of 10*l.* only, upon which they were at issue, and a repleader was awarded, though the defendant had pleaded that he paid it *secundum formam conditionis.* But this exception did not come before the court for their opinion: and judgment was affirmed upon the first point.

Ante 623.

Upon which affirmance a writ of error was brought returnable in Parliament, where after the case was settled, and I was ready to argue it, the plaintiff in error submitted, and paid the money.

Michaelmas Term

13 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir John Fortescue Aland, *Knt.*
James Reynolds Esq.
Sir Edmund Probyn, *Knt.* } *Justices.*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq; Solicitor General.*

Castle *verf.* Richardson.

LIBEL in the ecclesiastical court for not taking upon him the office of chapel-warden: the defendant pleads, that it is a donative, and thereupon moved for a prohibition. And upon debate the same was denied, the whole court being of opinion, that though there was a difference as to the incumbent, yet as to the parish officers there was none; for they are the officers of the parish, and not of the patron of the donative.

1 Barn. B.R. 5. S. C. Parish officers of a donative are subject to the spiritual court.

Torrent *verf.* Burley. In Scaccario.

BILL to discover whether the defendant's husband died worth 40 *l.* so as to be liable to pay the plaintiff a mortuary; and praying relief. Upon answer admitting assets, but denying the custom; the plaintiff went into a proof of his right, and several witnesses were examined on both sides. And at the bearing the bill was dismissed with costs as to the relief, because that was properly at law or in the spiritual court, and in a bill against one person only the right could not be established.

Cannot sue in equity for a mortuary. 2 Burn's Eccl. Law. 506.

The

The difmiffion was generally with cofts, though the defendant had not demurred to the relief, but run into a proof of the right. *Strange pro quer'.*

Dominus Rex *verf.* Tenant.

After defendant is difcharged at feffions a new order of baftardy cannot be made. L. Raym. 1423. 1 Sefs. Ca. 272. pl. 213. S. C.

UPON an order of baftardy the defendant appealed to the feffions, where upon a full hearing he was difcharged; afterwards the fame juftices make a new order upon him. And *Lee* moved to quafh it, the defendant being by the former order of feffions abfolutely difcharged. 1 *Vent.* 59. *Cro. Car.* 350. 2 *Bulft.* 355. And of that opinion was the court, and quafhed the laft order.

Dominus Rex *verf.* Reeks.

9 & 10 W. 3. c. 25. How to authenticate an admiffion that is not ftamped at the time. L. Raym. 1445. 1 Barn. B. R. 8. S. C.

UPON a trial at bar on an information *in natura de quo warranto* for the office of burgefs of *Chrift-Church*, the admiffion of the defendant was produced, and it appeared to be a parchment that had only one ftamp, and yet had five admiffions entered upon it. And in order to make it good, they had annexed four other parchments, each of which was ftamped. And the court held that would not make it good, and that the proper way would have been to have paid the four penalties, and had four new ftamps on the firft parchment, as was done in the bifhop of *Chefter's* cafe, *ante* 624. And for want of this there was a verdict againft this and the other four defendants (1).

The next day they moved for a new trial (2). And the court would not hear any thing of the motion, unlefs they produced the admiffion, and fhewed they had paid the penalty. And the defendants not caring to be at that certain expence for the uncertainty of gaining a new trial afterwards, they fubmitted to judgment of *oufter*.

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1) But it feems according to the report in *Ld. Raym.* which is much fuller, that the admiffion of the firft perfon named in the admiffion was good, and that the defendant was named third. *Vide* in *Gilbert* v. *Lockyer*, *Doug.* 217. S. P. And there is no mention either in that report or in 1 *Barnard.* of there being a verdict againft any other perfon but *Reeks*.

(2) *Mufgrave* v. *Nevinfon*, *ante* 584. *Smith* v. *Parkhurft*, *poft.* 1105.

Gradell *verſ.* Tyſon.

DEBT upon a bond by the executor of the ſurviving executor of the obligee; and on error after a verdict *Strange* objected, that it was not ſhewn, that the firſt executors proved the will; and if not, this executor could maintain no action, but it muſt be brought by the adminiſtrator *cum teſtamento anexo.* Being after a verdict, the court held it well enough, and affirmed the judgment.

Jeofail.
L. Raym. 1441. S. C.
In errore. C. B.
But a different point.

Griffin *verſ.* Scott.

TRESPASS for entering his houſe, and keeping poſſeſſion of his goods eight days. The defendant juſtifies under a diſtreſs for rent; to which the plaintiff replies, a tender; and on demurrer it was objected, that it ought to be pleaded with an *uncore priſt. Lutw.* 591. *Tho. Ent.* 265. *Winch.* 939. *Cro. Jac.* 423. *Salk.* 622. *Sed per curiam,* Be the replication good or bad, yet we muſt go back to the firſt fault, which is in the plea, for the defendant ought to have removed the goods at the five days end; and for the other three he is a treſpaſſer, and there is no juſtification (1). *Judicium pro quer.'*

The landlord muſt remove the goods at five days end, or he is a treſpaſſer.
L. Raym. 1424.
1 Barnard. B. R. 3. S. C.

(1) See the report in *Ld. Raym.* more circumſtantial and accurate, according to it the defendant ſhould have removed the goods from the premiſes, not at the end of five days but in a reaſonable time and impounded them in a legal pound, becauſe the law, prior to 11 *Geo.* 2. *c.* 19. *ſect.* 10. did not allow the impounding a diſtreſs on the premiſes, except in caſes within 2 *W.* & *M. Seſs.* 1. *c.* 5.

According to it alſo the defendant was held a treſpaſſer, not for the three days, but *ab initio,* upon the authority of *The Six Carpenters caſe,* 8 *Co.* 146. and *Cartwright* v. *Combes, cor. Ld. Macclesfield,* C. J. *et vide* 3 *Black. Com.* 14. But by the 11 *Geo.* 2. *c.* 19. a diſtreinor may turn any part of the premiſſes upon which the diſtreſs is taken into a pound, and he ſhall not be deemed a treſpaſſer *ab initio* on account of any illegal act committed in making the diſtreſs. It is to be obſerved alſo that if this caſe had happened ſubſequent to this ſtatute, ſtill the defendant would have been a treſpaſſer for two days at moſt, not for three, as the goods could not have been ſold until the ſixth day after they were taken. *Wallace* v. *King,* 1 *H. Black.* 13.

Dominus Rex *verſ.* Puſey.

THE defendant colonel *Puſey* was indicted at the *Old Bailey* for perjury: and to avoid his appearing there, he moved, for a *certiorari,* and cited Sir *Humphrey Mackworth*'s caſe, *Paſ.* 9 *Geo. Sed per curiam,* That was not for forgery, but for affixing

No *certiorari* for a defendant to *Old Bailey.*
1 Seſs. Caſ. p. 315. no. 246.
1 Barn. B. R. 5. S. C.

fixing the feal of the company in his cuftody without their authority, which was a conteft of a civil nature : we muft make no diftinction of perfons, and therefore cannot grant a *certiorari* for a defendant without confent of the profecutor (1).

(1) *Rex* v. *Iles*, 1 *Sefs. Caf.* 321. *no.* 234. S. P. *Vide Rex* v. *Wells*, *ante* 549.

Barry *verf.* Barry.

Practice. *Mich.* 1 *Geo.* 2. *Ivery* and *Machen*, the fame was held again. L. Raym. 1452. S. C.

THE principal died after the return of a *capias ad fatisfaciendum* and before taking out a *fcire facias* againft the bail. And the court refufed to ftay proceedings againft them, for in ftrictnefs of law the bail are bound from the return of *non eft inventus*; and it is but *ex gratia* that a furrender after is accepted, which time they take at their peril. 1 *Roll. Abr.* 336. *pl.* 1. *ante* 511.

Murray *verf.* Thornhill.

Practice.

THE court refufed to make a rule upon the *Eaft-India* company to infpect their private books relating to the appointment of their fervants (1).

(1) *Shelling* v. *Farmer*, *ante* 646. *Hodges* v. *Atkis*, 3 *Wilf.* 398. and the note *poft.* 1223.

[718]

Wild *verf.* Sands.

Cannot enter judgment on warrant of attorney after the attorney's death.

IT was moved to enter up judgment on an old warrant of attorney, the defendant being living, and the debt unpaid; but it appearing, the party to whom the warrant was to confefs, was dead; the court would not grant the motion.

Aftell qui tam *verf.* Andrews.

L. Raym. 1421. S. C. poft. 1124. Selling a fingle gallon of wine by an unlicenced perfon in his own houfe which is drank in another, is a felling by retail under 12 Car. 2. c. 25.

ACTION of debt upon the ftatute 12 *Car.* 2. *c.* 25. for felling wine by retail twenty feveral times without licence. The defendant pleaded *nil debet*. And upon the trial the jury found the defendant Not guilty as to nineteen of the twenty times, and as to one particular time they find a fpecial verdict, *viz.* That the defendant was a merchant and dealer in wine in *Briftol*, and that in his manfion-houfe there, he fuch a day fold one gallon of wine to one *Mills*, who carried it to the *Guilders'* *Inn* in *Briftol*, and that it was there drank: that this inn belonged

to

to one *J. S.* and that the defendant had no licence for the felling of wine; *et fi*, *&c.*

The queftion in this cafe was, whether the felling of this one gallon of wine in the defendant's own houfe, which was fpent in another, was a felling by retail within the meaning of the ftatute.

Serjeant *Chapple* for the plaintiff argued, that the felling one gallon is a felling by retail within the ftatute, for the ftatute defcribes what fhall be accounted a felling by retail, *viz.* felling by pint, quart, bottle, or gallon, and though this was fpent in another perfon's houfe, yet it makes no difference, for the words of the ftatute are general.

At common law every man had liberty to fell wine as he could, either by wholefale or retail, until the ftatute 7 *E.* 6. *c.* 5. which was the firft reftraining ftatute. And the next ftatute is the 12 *Car.* 2. upon which this action is brought, and this ftatute appoints commiffioners to grant licences to fell wine by retail, and reftrains more particularly than the former ftatute, for the words are, fhall not be drank within manfion-houfe or without. *Vide Hard.* 338.

Fazakerley contra argued, that this being a penal ftatute, ought not to be extended further than the exprefs words would carry it: the act was intended only to oblige perfons refiding in particular places, and who made a trade of felling by retail, to take licences, and not to fubject a merchant to a penalty for one particular act: he cited 8 *Co.* 129, 130. where it is held, that a perfon may ufe a trade in a particular inftance, notwithftanding the general reftraint by the ftatute 5 *Eliz.* and to brew or bake for himfelf or family, is no offence within that act. And there being only one act found againft the defendant, it was never the intention of the ftatute, to make fuch a perfon liable to the penalty. [719]

This term the Chief Juftice delivered the opinion of the court: and declared, that they were all agreed in it, that the plaintiff muft have judgment; for the words of the ftatute are plain and exprefs, and take in this very cafe; and it is not reafonable to allow a merchant to fell by retail without licence, any more than another perfon, for the words are general, *no perfon or perfons whatfoever.* And though the jury have found the defendant guilty of but one act, yet that is plainly within the ftatute, for the ftatute gives a diftinct penalty for every particular offence. And therefore this fingle act of the defendant fubjects him to fuch penalty. Judgment for the plaintiff.

Story *verſ.* Atkins.

An *indebitatus aſſumpſit* in an inferior court may ſave the ſtatute of limitations on a promiſſory note.
A declaration in an inferior court upon an *indebitatus aſſumpſit* and one upon a promiſſory note in a ſuperior, may be averred to be for the ſame cauſe of action, although the ſum claimed by the *aſſumpſit* exceeds the amount of the note.
A declaration that the defendant was indebted to the plaintiff in 20l. for different ſums of money by the defendant to the plaintiff formerly lent, which in conſideration thereof he promiſed to pay, may be good by cuſtom; and the cuſtom is ſufficiently averred when the replication avers that *ſecundum conſuetudinum civitatis præd'*, he there declared without ſetting forth the cuſtom at large.
If the declaration had been ill, yet the plaint being regular it would have been ſufficient to have prevented the ſtatute of limitations (1).
Promiſſory note may be given in evidence upon an *indebitatus aſſumpſit* (2).

ACTION upon the caſe upon ſeveral promiſes; and the plaintiff declares firſt upon a promiſſory note for 12 *l.* 11 *s.* ſecond count upon an *indebitatus aſſumpſit* for 20 *l.* money lent, and third for money laid out.

To the firſt count upon the promiſſory note, the defendant pleads, that the cauſe of action did not accrue *infra ſex annos*, and to the other two counts he pleads *non aſſumpſit* generally, upon which iſſue is joined.

And as to the defendant's plea to the firſt count, the plaintiff replies, and admits that the cauſe of action as to the firſt count did not ariſe within ſix years before his exhibiting his bill in this court, but that it aroſe the 25th of *March* 1720. and that upon the 11th of *February* 1725. in order to recover the money due to him upon that promiſe, he levied his plaint in the ſheriff of *London*'s court, *in placito tranſgreſſionis ſuper caſum*; and avers that *ſecundum conſuetudinem civitatis præd'*, he there declared againſt the defendant in an action upon the caſe, and ſets forth his declaration; which was, *eo quod* the defendant ſuch a day *indebitat' fuit quer' in* 20 *l. pro. diverſ. pecuniarum ſummis per præd' def. præfat' quer' prius debit*, which he promiſed to pay: then the plaintiff ſet forth that the defendant hereupon brought his writ of *habeas corpus*, by virtue of which the ſaid plaint was removed into this court, and the plaintiff declared againſt him *de novo*; and avers it to be *pro eadem cauſa actionis pro qua levavit querelam ſuam præd' ut præfertur:* and then he avers, that the cauſe of action did accrue within ſix years before his levying the ſaid plaint in the ſheriff's court, and therefore prays judgment.

To this replication the defendant demurred, and ſhewed for cauſe, that it did not appear by the plaintiff's replication, that his bill againſt the defendant in this court was for the ſame cauſe of action, as that for which he levied his plaint in the court below. Upon which there was a joinder in demurrer.

And Mr. *Reeve* for the defendant took ſeveral exceptions to the replication.

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(1) *Bevin* v. *Chapman*, 1 *Sid.* 228. S. P. *Matthews* v. *Phillips*, *Salk.* 434. *Mois* v, *Bueerton*, 1 *Ld. Raym.* 553.

(2) *Vide Randulph* v. *Regendo*, *P. Geo.* 2 *Bull. L. N. P.* 136, 137.

1. That

1. That it ought to appear, either by the proceedings themselves, or by sufficient words of averment, that the cause of action is the same in both courts: and in this case, it does not appear by any means upon the face of the proceedings, that the cause of action is the same in both courts; for the declaration in the inferior court is upon an *indebitatus assumpsit*, and the declaration here is upon a promissory note, which are causes of action manifestly different: nor is there any sufficient averment in the replication, to shew the identity of the cause of action in the two courts, for the words are only these, *quod* (the plaintiff) *exhibuit billam suam pro eadem causa actionis præd' ut præfertur*, which is not issuable, neither is it confined to the matter of the first count, as it ought to have been, but goes generally to the plaintiff's whole declaration in this court.

2. The causes of action appear plainly to be different; because the declaration in this court being upon a promissory note, and the declaration in the court below upon an *indebitatus assumpsit*, for a different sum, they cannot be intended to be the same, for the promissory note could not be given in evidence upon the *indebitatus assumpsit*; and the two actions can never be intended to be the same, unless the same evidence will support both; and if they are different in their nature, no averment can reconcile them.

3. The plaintiff's declaration in the court below appears to be ill, for he has only declared by way of general *indebitatus assumpsit* for so much money *per præd' def. præfat. quer' prius debit'*; which is ill, because it does not shew a consideration, or how the debt arose; which is what is always required, that the court may judge, whether it is a matter proper for such an action: and though this method of declaring may in some places be warranted by custom, yet in all such cases the custom ought to be [721] set forth specially, and it is not sufficient to say *secundum consuetudinem* generally; as in *Rast. Ent.* 550. where *concessit solvere* is held to be well, by alleging the custom to declare in that manner, otherwise it would be ill.

Blencowe contra. There have been several exceptions taken to the replication, and the principal objection to it seems to be the first exception, That the plaint in the court below, and the action in this court, appear to be plainly different, and cannot be intended to be for one and the same cause. And I must agree that this objection will have great weight, if it can be supported by any thing that appears upon this record: but if the cause of action appears, or may be intended, to be the same in both courts, then your Lordship's judgment will be for the plaintiff.

The point therefore to be confidered upon this exception, is the *identity of the caufe of action in the two courts.* And though it is objected, that there is a plain and manifeft variance both in the nature and caufe of the two actions, becaufe the plaintiff hath declared in the inferior court upon a general *indebitatus affumpfit* for 20 *l.* and in this court upon a promiffory note for a different fum: yet I muft beg leave to obferve, that what is properly to be called *the caufe of action* appears plainly in this cafe to be the fame in both courts; for it is the defendant's *breach of promife*, which is the caufe and foundation of both the actions: and though it is objected that the plaintiff hath declared for different fums in the two actions; yet that can have no effect upon the caufe of action, for in both actions the *quantum* is to be afcertained by the jury: and in this cafe the damages which are demanded, are laid to be the fame in both declarations, fo that there is no foundation for that objection.

I admit that the declaration in this court is founded upon a ftatute, and the other is a declaration at common law: but unlefs there appears fuch a variance and inconfiftency in thefe two actions, as neceffarily obliges your Lordfhip to intend them to be for different caufes, your Lordfhip will not prefume them to be fo; efpecially if the different methods of declaring in the two courts, can by any means be reconciled to one and the fame caufe of action.

At common law the party that was poffeffed of a promiffory note, had no other remedy to recover upon it, but by declaring upon an *indebitatus affumpfit*, in which action he might give the note in evidence, but was obliged to prove the confideration. The ftatute 3 & 4 *Ann. c.* 9. gives the party the liberty of declaring upon the note itfelf; and fince the making of that fta-
[722] tute, the note hath been held to be fufficient evidence to maintain fuch action, without giving any further proof of the confideration: in this refpect therefore thefe notes are altered by the ftatute, but in no other; for their *lien* is made no ftronger than it was before; they are ftill only fimple contracts, and the nature of their fecurity is not changed, as was adjudged in the cafe of *Cumber* v. *Wane*, *Pafch.* 7 *Geo. in B. R.* where in an action upon the cafe for money lent, the defendant pleaded a promiffory note given in fatisfaction, and it was held to be no bar. And if this is all the alteration which the ftatute hath made in refpect of thofe notes, how can it be fuppofed, that it hath taken from the party what was his former and ancient remedy of declaring upon an *indebitatus affumpfit?* The ftatute only gives him an additional and more eafy method of recovering upon his note, but does take from him his election of purfuing his former method,

if

if he thinks it more proper for his case. And what proves this still more strongly, is the case of *Bromwich* v. *Lloyd*, *in Lutw.* 1585. where it is expresly held, that upon an *indebitatus assumpsit* a bill of exchange may be given in evidence; and by the same reason a promissory note may be given in evidence on the like declaration; for the statute 3 & 4 *Ann.* puts promissory notes upon the same footing as bills of exchange were before the making of that law. Therefore since the plaintiff might have given this note in evidence upon his declaration in the court below, it would be a strange conclusion to say that the two actions are different in their nature, or to intend the cause of them to be different, when the same evidence will support both the actions.

As there is nothing therefore inconsistent in the nature of the two actions, I beg leave to insist upon the averment, which the plaintiff makes in his replication, as a matter which puts the identity of the cause of action in the two courts, out of all manner of dispute; for the plaintiff hath expresly averred *quod exhibuit billam suam* in this court *pro eadem causa pro qua levavit querelam suam* in the court below.

And though it is objected by Mr. *Reeve*, which is his second exception, that this averment is uncertain, and that the defendant could not take issue upon it: yet I must submit it, whether there is any foundation for this exception; for the plaintiff having set forth how he levied his plaint, and how he proceeded upon it, could not make his averment in a more proper manner than he has here done: for he says, *quod superinde exhibuit billam suam præd'* in this court *pro eadem causa actionis pro qua levavit querelam suam præd' ut præfertur*; so that here is an expres and positive averment, that his bill here and his plaint below, are for the same cause; and though the words *ut præfertur* refer it to the record, yet that cannot occasion any uncertainty, for there is nothing before set forth, but what agrees with this averment. [723

And though it is objected against this averment, that it is insufficient, because it is not confined to the first promise, upon which the demurrer now is; yet there can be no weight in this objection, for the averment is, that the plaintiff's bill in this court and his plaint below are for the same cause, which extends to all the counts in the declaration, and therefore necessarily covers the first promise: but if the record be rightly observed, there will appear to be no ground for this objection, for the replication begins with *quoad primam promissionem*, and then goes on and sets forth the proceedings in the inferior court, and confines the case to the first promise only.

The

The material part of the plaintiff's case is, that the two actions were *pro eadem causa*, and this is averred in such a manner, that if the defendant had rejoined, and said that the plaintiff's bill in this court was *pro alia et diversa causa, absque hoc* that it was *pro eadem causa*; there would then have been a plain and certain issue, confined singly to the identity of the cause of action, which is the very point upon which this case must turn.

And if the plaintiff hath made his averment in such a manner as is traversable, I must submit it, whether it doth not answer all the objections which are made against the identity of the cause of action; since the defendant by demurring has admitted it to be true: and to this purpose expresly is the case of *Sir Thomas Finch* v. *Lamb* in *Cro. Car.* 294, 295. 1 *Vent.* 252. where the point was, that in an action upon an *assumpsit* the defendant pleaded the statute of limitations, and the plaintiff replied and set forth an original brought within six years, which appeared to be laid in a different county and for different damages, upon which the defendant demurred, and insisted, that the new action varying in the county and damages, could not be intended to be for one and the same cause of action: but the plaintiff having averred that it was for one and the same cause of action, it was held, that this variance was not material, but was made good by the averment.

There hath been another exception taken to the form of the plaintiff's declaration in the court below, in the manner it is set forth in his replication; and the exception to it is, the third exception, that the plaintiff having only declared by way of general *indebitatus assumpsit* for so much money *per præd' defendentem præfato querenti prius debit'*, it is said this is ill, because it does not shew a consideration, or how the debt arose. And I admit, that if this were a declaration originally in this court, this would be a good objection: but this declaration comes before the court only by way of recital, and the plaintiff hath expresly averred, *quod narravit secundum consuetudinem civitat' præd'*, and a custom to declare in this manner in an inferior court hath frequently been adjudged to be good. In 1 *Roll. Abr.* 564, 565. *concessit solvere* was held to be well in the court of *Bristol*. In *Stiles* 198. the same form was adjudged to be good, and *Rolle* Chief Justice said, there was the same custom used in the city of *London*, and that it was good. And in 4 *Leon.* 105. the same form was held to be good, though the plaintiff had only said *quod narravit secundum consuetudinem*, and had not any otherwise set forth in his declaration the custom of declaring in that manner, which comes up fully to the present objection, and shews that the custom need not be specially alleged.

[724]

But I muſt ſubmit it in another light, whether the objections that are made upon the plaintiff's different form of declaring in the two courts, and upon his faulty manner of declaring in the court below (admitting it to be ſo) are not entirely foreign to the preſent queſtion. For the point to be conſidered upon this demurrer is, whether the plaintiff's bill in this court, and his original plaint in the inferior court, appear to be for the ſame cauſe: the replication ſays only *quod levavit querelam ſuam pro eadem cauſa*, ſo that the declaration in the court below is quite out of the queſtion; and therefore if the plaintiff's plaint in that court, and his action here agree the one with the other, it is all that is neceſſary; for the bare levying a plaint in an inferior court, is ſufficient to prevent the ſtatute of limitations, (1 *Sid.* 228.) and the demurrer is confined entirely to the variance between the *plaint* and the *action* here; and your Lordſhip will obſerve, that the *plaint below* and the *bill here* are exactly the ſame; for the plaint is *de placito tranſgr' ſuper caſum ad damnum* of the plaintiff 20 *l.* which agrees with the words of the bill in this court; and though the plaintiff hath gone on and ſet forth the continuances of that plaint, and his declaration upon it, which is more than he need have done, yet I hope no fault which may now appear in that declaration, ſhall prejudice him ſo far, as to make the levying of his plaint ſtand for nothing, and ſo admit the ſtatute to run againſt him and deprive him of his debt.

And I further ſubmit it, whether the regularity of the plaintiff's declaring in the inferior court can properly be examined into upon this demurrer: for his declaration and proceedings there come before this court only by way of recital, and to ſhew that the plaintiff made a legal demand and purſued his right within a proper time: and though the plaintiff's declaration below ſhould appear plainly to be erroneous, yet your Lordſhip will not now take notice of that, for that would be giving judgment upon a record which is not before you: and I beg leave to compare it to the caſe of *Williams* v. *Fowler*, *Mich.* 7 [725]
Geo. B. R. where in an action of debt brought againſt an adminiſtrator, he pleaded in bar, that his inteſtate was indebted to *J. S.* for goods ſold and delivered, and that *J. S.* thereupon impleaded him and recovered judgment againſt him in an action of debt upon a *mutuatus*; to which the plaintiff demurred. And though it appeared by the defendant's own ſhewing, that the judgment was erroneous in the manner he had recited it, yet the court held the plea to be good; for till it was reverſed in a proper manner, it was held to be a ſufficient judgment to bar the plaintiff. *Ante* 407.

And as the intention of the ſtatute of limitations was only to oblige perſons to demand and proſecute their rights in ſome legal

 method

method within a reasonable time, I hope it appears clearly that the plaintiff hath strictly pursued the intention of that law, by making his demand in the inferior court in the manner he hath set forth, and that it appears as fully to have been for the same cause of action. And therefore I pray your Lordship's judgment for the plaintiff.

Raymond C. J. The actions in the two courts are of such a nature, that they may be averred to be the same; for the statute 3 & 4 *Ann.* only gives an additional remedy upon promissory notes, but does not take away the old one: and I think this note might have been given in evidence upon the *indebitatus assumpsit*, for the note imports the drawer's having so much money of the other's in his hands; and though it may not perhaps be allowed in evidence in such case as a promissory note, without further proof of the consideration; yet it may undoubtedly be given in evidence on an *indebitatus assumpsit*, as a paper or writing to prove the defendant's receipt of so much money from the plaintiff. *Hard*'s case, *Salk.* 23.

And as the two actions may therefore be averred to be the same, so I take the averment to be sufficient and traversable; and the averment is confined only to the first promise, which is singled out by the word *quoad* in the replication, and closed as to the rest.

As to the objection that is made against the declaration in the inferior court, I think it of no weight; for though the declaration should be ill, yet if the plaint be regular it is sufficient to prevent the statute.

Reynolds and *Probyn* Justices, were of the same opinion; but

[726] *Fortescue* J. held strongly, that the two actions were of so different a nature, that they could not be averred to be the same. He agreed, that the variance in the sums did not prevent the averment of their being for the same cause; but he held strongly, that since the statute a promissory note could not be given in evidence upon an *indebitatus assumpsit*; and cited the case put by *Hale*, 1 *Vent.* 252. which is this: *A.* in consideration that *B.* would marry his daughter, promised to pay 100 *l.* and in an action brought the plaintiff was barred; and in another action brought the promise was laid to pay the 100 *l.* at request, and it was held it could not be averred to be the same.

In the other points he agreed with the rest of the Judges; and said, that the form of declaring in the court below was well

enough: that it had been so adjudged between *Stephens* and *Greenland* in this court, and that the case in 4 *Leon.* 105. was in point. Judgment for the plaintiff.

Higgins *versf.* Jennings.

TRESPASS *quare clausum fregit*, and for erecting a wall, and spoiling the grass *pedibus ambulando*. The defendant pleads Not guilty as to all but the treading down the grass, and as to that justifies for a way. The plaintiff replies *extra viam*, upon which they were at issue, and the jury find for the plaintiff upon both issues and 2*d.* damages. Upon motion the court ordered full costs, though there was no certificate, it appearing by the record that the freehold was in question (*a*). 2 *Lev.* 234 (1).

Where full costs though damages under 40*s.* L. Raym. 1444. S. C.

(*a*) Cit. Gilb. Ev. Rep. 198. S. C. 2 Snow. 28. but not S. P.

(1) *Beale* v. *Moore*, *post.* 1168. S. P. But it is otherwise if the extent and place where the way lies has been agreed upon in the pleadings. *Cockerill* v. *Allanson*, *B. R. T.* 22 *Geo.* 3. *Hullock on Costs.* 86. *Bull L. N. P.* 330. S. C.

Huggins *versf.* Durham et ux'.

ERROR of a judgment in *C. B.* in an action of debt brought by husband and wife against the warden of the *Fleet* for 464*l.* 6*s.* 2*d.* on the escape of *Oliver Read*, who was committed by the court of Chancery for that sum. And the declaration sets forth, that 5 *February* 6 *Geo.* there was a decree reciting the bill against *Read et al'* by the wife only, which suit abated by her marriage with the other plaintiff, who revived the suit, and *Read* put in his answer, insisting that he had repaid 200*l.* part of the money; and an issue being directed thereupon, the same was tried in a feigned issue, and found against him; that then the cause was heard upon the equity reserved, when it was referred to the master to take the account, who afterwards reported 464*l.* 6*s.* 2*d.* to be due, and appointed it to be paid to the husband, Then the plaintiffs set forth, that the report was confirmed, and *Read* prosecuted so far, as to be committed for non-payment, when the defendant suffered him to escape. [727]

Where husband and wife may join in an action of escape.

After judgment by default in *C. B.* it was objected on error by Mr. *Strange*, that the wife ought not to have joined in this action, for by 5 *Ann. c.* 9. § 4. the action is given *to such person to whom the money is to be paid* by the decree; and this not being

5 Ann. c. 9. s. 4.

an action maintainable at common law, they must take it as the statute has given it; and if the wife be joined where she ought not, it is error. 1 *Roll. Abr.* 782. And this is in the nature of a destruction of the first cause of action, and giving the husband a new one in his own right. 1 *Sid.* 299.

Sed per curiam, Though the order only appoints it to be paid to the husband, yet by the first decree it is directed that the master shall take an account what is due to the husband and wife, which shews she is interested in the case, and therefore proper to join in the action. Judgment affirmed.

Gregson *vers.* Heather.

4 Ann. c. 16. Sheriff may assign a bail bond out of the county, and the action be brought where the assignment was. L. Raym. 1455. Fort. 366. S. C. *Trin.* 13 *Geo.* *Norcroft* and *Matthews*, the same point ruled so again on the authority of this case.

DEBT upon a bail bond. And declares that he took out a writ directed to the sheriff of *Surrey*, *&c.* who took a bail bond, which he afterwards assigned to the plaintiff at *London*, where the action was brought. On demurrer it was objected, that the action was grounded on the bond entered into by the bail, and that being laid to be done in *Surrey*, the action should have been there.

Strange contra. The action is founded on the assignment which is the only thing that impowers the plaintiff to sue, and that is laid to be where the action is brought. 2 *Roll. Abr.* 602. *pl.* 9. Action for escape laid in *Nottinghamshire*, of one arrested by the sheriff of *York*. *Cro. El.* 625. 1 *Sid.* 218. the plaintiff has his election to bring his action for a false return, either in *Middlesex*, where the writ is returned, or in the county where the party was arrested. And if it should be thought that the executing the bond is part of the cause of action, yet 7 *Co. Bulwer's* case is express, that where matter in one county is dependant on matter in another county, the plaintiff may lay his action in either. *Et per curiam*, The law is certainly so, therefore judgment for the plaintiff.

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Sutton *vers.* Bryan.

Practice. *Trin.* 13 *Geo.* *Cobb* and *Kingsmill*, the same rule.

THE court gave costs for not going on to execute a writ of inquiry according to notice; and said it was as reasonable, as in case of a trial (1).

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(1) *Vide Shadford* v. *Houston*, *ante* 317. S. P.

Batson et al' *verf.* Sayer.

In Middlefex coram Raymond *C. J.* de B. R.

IN an action for a falfe return of a *mandamus* to fwear the plaintiff into the office of churchwarden, the plaintiff fet out, that he was elected, and prefented himfelf to be fworn, but was refufed; and *non fuit electus* returned.

There may be a felect veftry, and what is laid only as a circumftance need not be proved.

The Chief Juftice held, that by law there may be a felect veftry, and that in this cafe the plaintiff need not prove the prefenting himfelf to be fworn, becaufe that is but a circumftance, and not to the point of truth or falfity of the return (1).

(1) So alfo in penal actions, *Combe* v. *Pitt*, 3 *Burr.* 1586.

Dominus Rex *verf.* Rhodes.

At the Old Bailey.

INdictment for forging a letter of attorney, whereby he transferred Mr. *Heyfham*'s ftock, and Mr. Juftice *Fortefcue* refufed to let *Heyfham* be a witnefs (1).

Party whofe name is to a deed, no witnefs to prove it a forgery.

(1) *Shank qui tam* v. *Payne*, *ante* 633. But fee *Rex* v. *Broughton*, *poft.* 1229. *Abrahams qui tam* v. *Bunn*, 4 *Burr.* 2251. *Bull. L. N. P.* 288. and *Will*'s cafe *cor.* *Willes* C. J. *Bull. L. N. P.* 289.

Ofborn *againft* the Governors of Guy's Hofpital.

At Guildhall coram Raymond *C. J.*

THE plaintiff brought a *quantum meruit pro opere et labore* in tranfacting Mr. *Guy*'s ftock affairs in the year 1720. It appeared he was no broker, but a friend; and it looked ftrongly, as if he did not expect to be paid, but to be confidered for it in his will. And the Chief Juftice directed the jury, that if that was the cafe, they could not find for the plaintiff, though nothing was given him by the will: for they fhould confider how it was underftood by the parties at the time of doing the bufinefs, and a man who expects to be made amends by a legacy, cannot afterwards refort to his action.

Where a man does work in expectation of a legacy, he cannot fue the executor. Bull. L. N. P. 145.

Goodright ex demiss. Lisle vers. Pullin et al'.

Devise to *A.* for life, and after to his heirs male of his body and his heirs for ever, and for want of such heir male, remainder over, is an estate tail in *A.* (1). L. Raym. 1437. 1 Barnard. B. R 6. 2 Eq. Abr. 315. S. C. Vide Fearne 4 ed. 282.

SPECIAL verdict in ejectment upon a devise by *Nicholas Lisle*, which was in this manner: " I *Nicholas Lisle* give " and bequeath unto my wife all that my messuage or tenement " called *Hattersfield*, to hold for the term of her natural life, " and after her decease, then to my kinsman *Nicholas Lisle*, for " and during the term of his natural life, and after his decease " *unto the heirs males* of the body of the said *Nicholas* lawfully " to be begotten and *his heirs for ever:* but in case the said *Nicholas* die without *such heir male*, then I give and bequeath the " said premisses unto my kinsman *Edward Lisle* for and during " his natural life, and after his decease to the heirs males of " his body lawfully begotten and his heirs for ever; and for " default of such heir male, remainder over." The jury find, that upon the testator's death his widow entered and died seised, and that *Nicholas Lisle* (the devisee) and the widow, in her life-time, suffered a common recovery, to the use of the said *Nicholas* in fee, and that the said *Nicholas* entered upon the death of the widow, and died seised, leaving no issue.

Edward Lisle the lessor of the plaintiff claims as heir male to *Edward Lisle* (the remainder-man in the will) supposing this to be only an estate for life to *Nicholas*, and therefore that the recovery suffered by him and *Mary* (the widow) could not bar the remainders. The defendant claims as heir in fee to *Nicholas*. The single question therefore is, whether *Nicholas* the devisee took an estate tail, or only an estate for life, by this will.

Bootle, for the plaintiff argued, that it appear'd plainly to be the intention of the devisor, that *Nicholas* should take an estate for life only; for the premisses are expresly limited to him for life; and if the testator had intended him an estate tail, why is there this restriction?

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(1) Beside the present case superadded words of limitation have been held not to restrain the legal operation of a limitation to *heirs* or *issue* of the body in *Legate* v. *Sewell*, 1 *P. Wms.* 87. 1 *Eq. Abr.* 394. 2 *Vern.* 551. *Morris* v. *Le Gay*, *cited* 2 *Burr.* 1102. 2 *Atk.* 249. *Fearne C. R.* 4 *ed.* 247. *Minshull* v. *Minshull*, 1 *Atk.* 411. *Wright* v. *Pearson Fearne C. R.* 4 *ed.* 187. *Ambl.* 358, S. C. *King* v. *Burchell*, 4 *Term Rep.* 296. *Amb.* 379. *Roe* v. *Grew*, 2 *Wils.* 322. *Denn* v. *Puckey*, 5 *Term Rep.* 299. and see *Doe ex dem. Blandford* v. *Applin*, 4 *Term Rep.* 82. As to the cases in which they have been controlled by subsequent words, *vide Shaw* v. *Weigh post*. 804. *Low* v. *Davis*, *post*. 849.

The fon of *Nicholas*, if he had had one, could not have taken by way of prefent and immediate devife, but as a purchafer after the deceafe of his father, becaufe the limitation is to his heirs males, *after his deceafe*, and not till then; and a devife to *A.* for life, remainder *to the fons of his body* lawfully begotten, is only an eftate for life, 1 *Roll. Abr.* 837. *pl.* 13. In *Wild*'s cafe, 6 *Co.* 17. a devife to one and after his deceafe to his children, is only an eftate for life, and the children muft take by way of remainder: which cafe agrees with the prefent, for here it is a devife to *Nicholas* for life, and after his deceafe to his heirs males.

But the fubfequent words in this will, will make the cafe much ftronger, which are thefe; *In cafe the faid Nicholas die without fuch heir male*; for the words *fuch heir male* in the fingular number, are relative, and qualify the foregoing words *heirs males of his body*, by pointing out and defcribing the *very perfon* that is to inherit, fo as to make him a mere purchafer. And *Archer*'s cafe, 1 *Co.* 66. comes up fully to this cafe, and is founded on the fame reafon: and the only difference in the two cafes is, that in *Archer*'s cafe the limitation was to the next heir male, and in the prefent cafe the devife is to *his heir male*, and the word *next* is omitted: yet the words *his heir male* are as plain a defcription of the perfon, as the words *next heir*, and therefore cannot be taken to be words of limitation, any more than in *Archer*'s cafe. [730]

Fazakerley contra. The intention of the teftator is an uncertain rule for the conftruction of wills, which muft be confidered by the rules of law. *Cro. Eliz.* 525.

The words *heirs males* are words of limitation even in a deed, 1 *Co.* 104. *Shelley*'s cafe.

By the devife in the prefent will there is an eftate tail executed in *Nicholas*; and tho' it is objected, that the limitation being to him *for life* exprefsly, will alter the cafe; yet there is nothing in that objection, as was adjudged in the cafe of *King* v. *Melling*, 1 *Vent.* 225. and 2 *Lev.* 58. where the devife was to his *fon Bernard for life*, and after his deceafe to the iffue of his body lawfully begotten on his fecond wife; and yet it was held to be an eftate tail in *Bernard*; which is a ftronger cafe than the prefent, and fully anfwers the objection of the exprefs limitation to *Nicholas* for life only.

It is objected, that the word *his* muft controul the precedent words *heirs males*, and relate to them; but it is not neceffary that

it

it should relate to *heirs males*, for it may be satisfied by a better construction, by referring it to the word *Nicholas*, which is in the singular number. It was certainly the intent of the testator, that all the heirs of *Nicholas* should take; but by construing the word *his* to relate to *heir male*, the estate would vest by way of *designatio personæ* in the eldest son only, for he only is the heir male, and all the other sons would be excluded.

The words *heir male* are *nomen collectivum*, and include all the *heirs male*, as the word *issue* does, and *ex vi termini* takes in the whole generation; so that under that description all the sons may take, and it is not confined to one. In the case of *Backhouse* v. *Wells*, in Lord *Parker*'s time, a devise was to *A. for life only*, and after his decease to his issue; and this was held to be an estate for life in *A.* because of the words *for life only*, and the limitation after being to his *issue*, which is a word of purchase. But Lord *Parker* took a distinction, that if the words had been *heirs male* instead of *issue*, the operation of the law would have been too strong for the intention of the testator.

[731] Ab. Caf. Eq. 184.

In the present case there is an express estate tail devised, and no special words to controul or alter it, and therefore it ought to be so adjudged, as in the case of *Atkins* v. *Atkins*, *Cro. Eliz.* 248. and if any words are to be rejected, it is most rational to reject the latter.

Raymond Chief Justice, It will be a difficult thing to make this an estate for life: and the case of *King* v. *Melling* answers all the objections, as to the limitation to *Nicholas* for life.

The word *issue* is a proper word of purchase, but the word *heirs* is always a word of limitation (2), and the word *heirs* being used in this case, the words *after his decease*, are of no force.

The words *heir* and *heir male* are *nomina collectiva*, and include all the heirs of the devisee: and in *Archer*'s case it was the word *next* which confined it to one particular person, for without that word, it would have been a limitation, and not a purchase.

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(2) *Vide ante* 31. But the words, "*heirs of the body*" have been considered as words of purchase where the intent required it in a covenant to stand seised to uses. *Lisle* v. *Gray*, 2 *Lev.* 223. *Raym.* 278. as also in a deed of trust. *Allgood* v. *Withers*, cited 2 *Burr.* 1107. *Et vide* the opinion of *Hardwicke* Lord C. in *Bagshaw* v. *Spencer*, 2 *Atk.* 570. 1 *Vef.* 147.

The

The word *his* is the word which makes the difficulty in this cafe; but I think that it may very properly be referred to *Nicholas* himfelf. Suppofe *Nicholas* had had feveral fons; if the eldeft had been made a purchafer by this will, the other fons could not have taken; and there muft be ftronger words than thefe to controul the words *heirs males* and make them words of purchafe. I therefore think this clearly to be an eftate tail in *Nicholas*.

Fortefcue Juftice, I am clearly of the fame opinion: and think the cafe of *King* v *Melling* to be a much ftronger cafe; becaufe of the power there given to make a jointure. The word *heirs* is certainly a word of limitation, unlefs there are other words which confine it to a particular perfon, as the words, *next*, *eldeft*, &c. and without fuch words added to it, it can never be a word of purchafe: but it hath been held that the word *iffue* may be conftrued either way.

The word *heir* refers to *Nicholas*, and the word *fuch* means fuch heir male in fucceffion. [732]

In *Archer's* cafe the particular perfon was pointed out by the word *next*; and in *Wild's* cafe there is the word *children*, which could not be a word of limitation, and he cited *Moor* 124.

Reynolds and *Probyn* Juftices, of the fame opinion, and judgment was given for the defendant by the whole court.

Earle *verf.* Hinton. In C. B.

Executor cannot plead judgments to the *fcire facias* which he might have pleaded in the action (1).

A *Scire facias*, was brought againft the defendant as executrix of her late hufband deceafed, upon a judgment obtained againft her as executrix. To which fhe pleaded in bar, a judgment obtained againft her teftator for fo much money, and that fhe had not affets *ultra*, &c. To this the plaintiff demurred.

Raby Serjeant for the plaintiff infifted, that the defendant might have pleaded the judgment againft the teftator in bar to the action

(1) *Trail* v. *Edwards*, 6 *Mod.* 308. *Skelton* v. *Hawling*, 1 *Wilf.* 258. *Wharton* v. *Richardfon*, *poft.* 1175. *Ramfden* v. *Jackfon*, 1 *Atk.* 292. *Erving* v *Peters*, 3 *Term Rep.* 685 *Bull. L. N. P.* 122. And according to the two laft cafes it is immaterial whether the original judgment againft the executor was by confeffion or default, or whether there had been a verdict againft him he having neglected to plead *plene adminiftravit*.

action brought against the defendant as executrix, and she having neglected to do that, shall not be at liberty to plead it now to the *scire facias*; for her suffering judgment to go against her as executrix is an admission of assets. 3 *Lev.* 113, 114. *Salk.* 310 (*a*).

(*a*) L. Raym. 589. Com. 87. 3 Term Rep. 690. S. C.

Eyre Chief Justice, It is a settled rule in law, that if a defendant has a matter proper for his defence, and he neglects to plead it in bar to the action at the time he may, he shall never take advantage of it after (2). If an executor hath 100 *l.* assets, and there are two creditors each for 100 *l.* and both sue him for that sum; the executor hath no way but to suffer judgment to one, and plead it in bar to the other (3). And if he suffers judgment in both actions, he cannot plead the judgment of one against the *scire facias* of the other, but must pay both debts. If a tenant in tail upon a *scire facias* be returned tenant in fee, and suffers judgment by default; upon an *elegit*, and ejectment brought, he cannot give in evidence, or any ways defend himself by his tenancy in tail, because he might have pleaded it in bar to the *scire facias*. 2 *Sid.* 12. 1 *Sid.* 54. *Hob.* 283, Judgment for the plaintiff.

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(2) *Vide post.* 1043.

(3) *Anon. Show.* 202. *Watson* v. *Ogden*, *Doug.* 452. *S. P.* where the debts were in the same degree, But a plea by an administrator of judgment confessed on a single contract debt to an action on a bond must aver that he had no notice of the specialty creditors' demand. *Sawyer* v. *Mercer*, 1 *Term Rep.* 690.

Burrows *vers.* Jemino. In Canc'.

[733]

A man cannot be sued here on his acceptance of a bill of exchange abroad after he has been discharged by the laws of that country.

A Bill of exchange was drawn upon the plaintiff at *Leghorn*, which he accepted: but by the law there, if a bill be accepted and the drawer fails, and the acceptor hath not sufficient effects of the drawer in his hands at the time of the acceptance, the acceptance becomes void (1). And this happening to be

Mosely, 1. Sel. Caf. in Chan. 169. 2 Eq. Ab. 524. c. 7. S. C. 12 Vin Abr. 476. pl. 2. 524. pl. 7. Sel. Chan. Caf. 69. S. C. Theo. Evid. 39. Tri. at Ni. Pri. 231. 3 Keb. Rep. 785. pl. 34. Comb. 120. 3 Mod. 194. *n. to 2d. ed.*

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(1) In *Mosely's Rep.* the custom is stated to be, "that if the drawer has failed before the acceptance of the bill, and the acceptor at that time has no notice thereof, he shall not be obliged to pay the bill unless he has effects of the drawer's in his hands, and then he shall be only answerable for their value." But 2 *Eq. Ab.* 524. represents the custom to be as it is stated here.

the

the plaintiff's cafe, in order to difcharge himfelf of this acceptance, he inftituted a fuit at *Leghorn*, and his acceptance was thereupon vacated by a fentence in that court. Afterwards the plaintiff returned to *England*, and was fued here at law upon this bill; and thereupon he exhibited his bill in this court for an injunction and relief.

King Lord Chancellor was clearly of opinion, that this caufe was to be determined according to the local laws of the place where the bill was negotiated: and the plaintiff's acceptance of the bill having been vacated, and declared void, by a competent jurifdiction; he thought that fentence was conclufive, and bound the court of Chancery here: and to this purpofe he inftanced the cafe of one *Hutchinfon*, which was in 29 *Car*. 2. and is mentioned in *Show*. 6. where *Hutchinfon* having killed a perfon in *Spain*, was there profecuted, tried and acquitted of the murder; and afterwards returning to *England*, he was indicted again for the fame murder here, to which indictment he pleaded the acquittal in *Spain* in bar, and the plea was allowed to be a good bar to any proceedings here (2).

And upon the Attorney General's infifting, that the plaintiff might have taken advantage of this matter upon a trial at law, and therefore not relievable in a court of equity:

The Chancellor declared, That if he was to try the caufe at law, he would allow the plaintiff the benefit of this matter upon the trial. But as other Judges might be of a different opinion, he would not put the plaintiff upon the difficulty and hazard of a trial. And he faid he remembered a cafe which came before him in the Lord Mayor's court, when he was recorder of *London*: where a mariner fued in the admiralty court for his wages, and there being a fentence againft him there, he afterwards brought his action in the Mayor's court for the fame wages; and his Lordfhip (as recorder) being doubtful whether he fhould allow the defendant to give the fentence in the admiralty court in evidence upon *non affumpfit*, afked the opinion of Chief Juftice *Holt*, who faid, That whatever defeated the promife, might be B.L.N.P. 151, 152.

(2) *Vide Blust* v. *Bampfield*, 1 *Chanc. Ca*. 237. *Newland* v. *Horfeman*, 1 *Vern*. 21. 2 *Chanc. Ca*. 74. *Ex parte Burton*, 1 *Atk*. 255. But where the fentence is not peremptory, an appeal from it to an higher court remaining undecided, and the party is willing to forego his fuit there, Chancery will not grant an injunction to prevent his fuing at law here. 1 *Vern*. 21. 2 *Chanc. Ca*. 74.

given

given in evidence on *non assumpsit*, and that the sentence in the admiralty court would be good evidence.

And in this case a perpetual injunction was granted, to enjoin the defendant from suing upon this bill. *In Canc.* 22d of *November* 1726.

Dawkins *vers.* Burridge.

12 & 13 W. 3. c. 3. Members of Parliament may be sued in C. B. by bill. L. Raym. 1442. 1 Barn. B. R. 7. S. C.

AN action was brought in the Common Pleas *by bill* against the defendant, who was set forth in the plaintiff's declaration to be a member of Parliament in this manner, (*viz.*) *eodem def' habente privileg' parliamenti*; the plaintiff had judgment by default, and the defendant now brought a writ of error.

And Mr. *Reeve* for the plaintiff in error took this exception to it: that the act 12 & 13 *W.* 3. *c.* 3. gives no power to the court of Common Pleas to proceed in such cases *by bill*. The words of the statute are, "That members of the House of Commons "may be proceeded against in his Majesty's courts of King's "Bench, Common Pleas, and *Exchequer*, by summons and "distress infinite, or by original *bill*, and summons, attach-"ment and distress." And he insisted, that the word *bill*, which is mentioned in the statute, is not to be applied to the court of *C. B.* but only to this court; for a *bill*, being the proper and usual process of this court, and an *original* the proper process of *C. B.* the statute did not intend to alter the process of the two courts, and to confound them; but to apply to each court its proper process, and leave it in that respect, as it was before.

But upon considering the words of the statute, the court were all of opinion, that the plaintiff might proceed against the defendant in the court of Common Pleas *by bill*, notwithstanding it was not the usual process of that court: for the court observed, that there was a proviso in the statute, "That it should not ex-"tend to give any jurisdiction to any court to hold pleas in any "real or mixt action, in any other manner than such court "might have done before the making of this statute; which "they said implied, that in personal actions, such as the pre-"sent was, the plaintiff might, by virtue of the first clause in "the statute, proceed either by *bill* or original." Judgment affirmed.

Crokatt *verſ.* Jones.

ACTION upon the caſe upon a bill of exchange. The defendant pleaded, that the bill was firſt exhibited 23 *October* 12 *Geo. quodque non aſſumpſit infra ſex annos ante exhibitionem billæ.* To which the plaintiff replied, that the action was firſt commenced 28 *November* 11 *Geo.* and that the defendant promiſed within ſix years before that: the defendant demurred. And Serjeant *Chapple pro def'* inſiſted, that it was not enough to ſay the action was firſt commenced ſuch a day, without ſhewing the proceſs, and continuing it down to the time of the declaration; and ſo is *Salk.* 420.

Amendment by adding continuances. L. Raym. 1441.

[735]

Strange contra cited *Tho. Ent.* 438. which is in the ſame form as this. But the court would not allow that as a ſufficient authority, and *Lutw.* 256. was cited as a caſe in point. Whereupon it was adjourned: and at another day I moved to amend the replication, by ſetting out the *latitat*, and adding the continuances; and cited *Winkworth* v. *Clarke* (*a*), where they were ſent up for after a writ of error, it appearing there (as it did in this caſe) that there were regular continuances, *P.* 4 *Geo.* and as to its being after a demurrer, I cited *Ruſſel* v. *Martin and Thorpe*, *ante* 583.

(*a*) See this caſe at large in 10 Vin. Abr. 39. pl. 47. & 1 Wilſ. 303—4. Ante 139. Poſt. 1227.

Serjeant *Chapple contra*, cited *Hales* v. *Hales in C. B. Paſ.* 11 *Geo.* where they refuſed to let the plaintiff add continuances after a demurrer. *Sed per curiam*, The authorities of our own court warrant it, and therefore let the replication be amended, on payment of coſts.

And afterwards the pleadings being cloſed, it appeared that the plaintiff declared upon two bills of exchange and ſeveral other promiſes; the defendant as to the two firſt counts upon the bills of exchange pleads *quod actio non accrevit infra ſex annos*, and as to the other counts *non aſſumpſit* generally. The plaintiff replies that upon ſuch a day he ſued out a *latitat*, which he continues down to the preſent declaration, and avers that the cauſe of action aroſe within ſix years before the ſuing out the *latitat*. The defendant rejoins: *proteſtando* that there was no ſuch writ iſſued as ſet out by the plaintiff, for plea ſays, that after the ſix years were expired, (*viz.*) ſuch a day, the plaintiff firſt ſued out a *latitat*, which he ſets forth, and that he appeared to it, and that the plaintiff declared upon it as above; and traverſes that he appeared and put in bail to the writ mentioned in the replication; *et hoc paratus eſt verificare.* The plaintiff demurred, and ſhewed for cauſe, that this rejoinder is contrary to the record of

There can be no iſſue offered that is contrary to the record.

the appearance, and is a negative pregnant. The defendant joined in demurrer.

Strange for the plaintiff argued that the rejoinder was contrary to the record; and this is not a denial of there being such a record, but an offer to put in issue the effect of it. And the plaintiff could not take issue and carry it to a jury, to inquire

[736] which writ the appearance related to. The only issue the defendant could have taken was, whether the cause of action accrued within six years before the *teste* of the first *latitat*.

Here is first a *protestando* that there is no such writ, and then the traverse admits it, and offers to try whether the defendant's appearance was upon that or another.

Second objection. If this were a matter issuable, yet there being a negative and an affirmative, the rejoinder is ill in the manner it is, for it ought to have concluded to the country.

Serjeant *Chapple* for the defendant, did not offer to support the rejoinder, but insisted that the replication was ill; for the plaintiff should have averred, that he actually sued out and prosecuted such writ to avoid the statute; but here he only says that the court awarded such a writ, and then sets forth the continuances upon it, which is not sufficient. *Thom. Ent.* 151. *Brownl. Red.* 104. *Salk.* 420.

The plaintiff should likewise have shewn, that a bill of *Middlesex* was taken out precedent to the *latitat*, for that is the foundation of a *latitat*, and ought always to issue first.

The court were of opinion that the rejoinder was ill, and that the writ and continuances were sufficiently set forth.

A *Latitat* prevents the statute of Limitations without a bill of *Middlesex*.

Raymond C. J. at first doubted whether the plaintiff ought not to have shewn that a bill of *Middlesex* issued before the *latitat*, because the bill is the foundation of the *latitat*. But afterwards he agreed with the rest of the court, that it was not necessary. *Stiles* 156. 1 *Sid.* 53. 60. (1) And judgment was given for the plaintiff.

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(1) *Hollyster* v. *Comer*, *ante* 550. S. P. *Bull. L. N. P.* 151.

Hilary Term

13 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir John Fortescue Aland, *Knt.*
James Reynolds *Esq.* } *Justices.*
Sir Edmund Probyn, *Knt.*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq. Solicitor General.*

Dudley *vers.* Nettlefold.

UPON a reference it was awarded, that the plaintiff should pay the costs; and there being no body appointed to tax them, the court supplied it by ordering the Master to do it (1). *Strange pro def'.* Award supplied by rule.

(1) *Vide Wall* v. *Fulwood*, *Com. Rep.* 331. *Stephenson* v. *Browning*, *Barnes* 56. *Furnis* v. *Hallam*, *ib.* 166. *Perry* v. *Nicholson*, *Say. Rep.* 240.

White *vers.* Holland et al'.

UPON debate it was held, that the rule for payment of 5 *l.* for not filing common bail according to the 9 & 10 *W.* 3. *c.* 25. § 33. should be made absolute on the first motion, the words of the statute being, that the court shall *immediately* award judgment, whereon the plaintiff may take out execution. *Strange pro quer'.* Practice as to the 5 *l.* for not filing common bail. Gilb. K. B. 369. 1 Tidd's Prac. 122. note (g).

Stiles *against* Serjeant Mead.

Plea of privilege without affidavit fet afide.

HE pleaded his privilege as a Serjeant, with a writ annexed. But for want of an affidavit that he had bufinefs there, and there only, the court fet it afide.

Brownfmith *verf.* Gilborne. In Canc.

No carrying a voluntary fettlement into execution.

THE defendant had two daughters, and on the marriage of one of them to the plaintiff's brother, the defendant entered into no agreement to give her any portion; but only told him, that as fhe had only that and one daughter more, the eftate would come between them.

Seven years after the marriage the two daughters with the mother's confent caft lots for the eftate, and an attorney was directed to prepare a fettlement of what fhould fall to each daughter, to be fettled after the death of the mother, as to this plaintiff's fifter-in-law, upon her and her hufband for life, with remainder to his right heirs. The attorney through careleffnefs omits to compleat the fettlement, either in the life of the wife or the hufband; and now the plaintiff as heir at law to his brother brings his bill to have the fettlement compleated, infifting that the marriage being had in profpect of the eftate, this was not barely a voluntary agreement, but was to be taken as in confideration of marriage.

But *King* Lord Chancellor difmiffed the bill with cofts; faying it was merely voluntary, there being nothing in writing at the time of the marriage, fo as to be an obligation within the ftatute of Frauds: at the time of cafting lots the mother was under no contract to do it, it was a voluntary act: and there could be no cafe fhewn, where a court of equity ever decreed the fpecifick execution of fuch an agreement (1). *Strange pro quer'.*

(1) *Vide Coleman* v. *Sarrel*, 3 *Bro. Chanc. Caf.* 12.

Radley *verf.* Rudge.

A piece of tepee, well in trover. (1) 1 Barn. B.R. 9. S.C.

UPON motion in arreft of judgment, it was held well enough in trover to declare *for a piece of tepee*, without faying how many yards it contained.

(1) *Thornton* v. *Barnard*, 2 *Ld. Raym.* 991. *et vide poft.* 809.

Dominus Rex *verſ.* Seaward.

INFORMATION againſt the defendant for challenging a perſon to fight. The defendant pleaded in abatement, that he was a ſurgeon, and not a Gentleman, as he was ſtiled in the information; and upon debate, the court gave leave to amend the information, upon payment of coſts (1).

Information amended after plea in abatement.
L. Raym. 1472. *Paſch.* 9 *Ann.* *Regina* v. *Burg' de Malmſbury*, miſtake of the name of corporation amended after plea in abatement.

(1) *Dub. Regina* v. *Stedman, Tutchin, Rex* v. *Johnſon*, cit. 2 2 *Ld. Raym.* 1307. *Rex* v. *Ld. Raym.* 1472. S. P.

Cheſman ex ux' *verſ.* Nainby.

ERROR of a judgment in *C. B.* in an action of debt upon a bond entered into by the wife *dum ſola*: the defendants crave *oyer* of the condition, which is ſet forth *in hæc verba*: "Whereas the above-named *Margery Nainby*, at the ſpecial inſtance and requeſt of the above-bound *Elizabeth Vicars*, is to take her the ſaid *Elizabeth Vicars* for her hired ſervant, to attend in her ſhop, and to inſpect her cuſtomers there, and to ſhew her goods, and further to ſtand by and aſſiſt her the ſaid *Margery* in her ſaid trade and buſineſs of a linen-draper, whereby it is preſumed the ſaid *Elizabeth*, if ſhe continues any length of time in the ſaid ſervice of the ſaid *Margery*, may become a perfect and knowing perſon in the ſaid trade and myſtery: and whereas the ſaid *Margery Nainby* conſents to hire and take the ſaid *Elizabeth Vicars* upon and in conſideration only upon the expreſs promiſe and agreement of the ſaid *Elizabeth*, that ſhe the ſaid *Elizabeth* ſhall not nor will at any time after ſhe ſhall have left the ſervice of her the ſaid *Margery* ſet up or exerciſe the trade or myſtery of a linen-draper, either by herſelf or by any other perſon or perſons in truſt for her uſe, either directly or indirectly, in any ſhop, room or place within the ſpace of half a mile of the ſaid now dwelling houſe of the ſaid *Margery Nainby*, ſituate in *Drury-lane*, or any other houſe that ſhe the ſaid *Margery Nainby*, her executors or adminiſtrators ſhall think proper to remove to, in order to carry on the ſaid trade of a linen-draper; nor ſhall ſhe the ſaid *Elizabeth* within the ſame ſpace of half a mile, directly or indirectly, be concerned in or aſſiſt or inſtruct any other perſon or perſons in the managing and carrying on the ſaid trade, under colour or pretence of being a ſervant to ſuch perſon or perſons, or under any other colour or pretence whatſoever: which ſaid expreſs promiſe and engagement, "joined

A bond to C. conditioned, in conſideration of her teaching B. a trade, that B. after leaving her ſhall not, either by herſelf or any other perſon for her uſe, carry on the trade or inſtruct any perſon to carry it on within half a mile of B's now dwelling houſe, or of any other houſe ſhe, her executors or adminiſtrators ſhall remove to, is good where the breach is aſſigned for inſtructing B's huſband in that trade within half a mile of A's then houſe.
L. Raym. 1456. Fort. 297. 3 Bro. Par. Ca. 349. Viner vol. 5. p. 56. note to ca. 21. Vol. 20. p. 327. S. C.

"joined with the good character and opinion that she the said "*Margery* hath in the integrity and honesty of her the said *Eliza*"*beth*, is the sole consideration and inducement that has obliged "the said *Margery* to take the said *Elizabeth* into her service for "the space of three years. Now the condition of the above obli"gation is such, that if the said *Elizabeth Vicars* shall act con"trary to and in breach of the above recited promise and agree"ment, according to the true intent and meaning thereof, or "of any part thereof, that then and in such case, the said *Eli*"*zabeth Vicars*, her executors or administrators, shall thereupon "pay or cause to be paid unto the said *Margery Nainby*, her "executors, administrators, or assigns, the full and just sum of "one hundred pounds of good and lawful money of *Great Bri*"*tain*, without fraud or further delay, the said sum of one "hundred pounds being the consideration money which it is "computed the said *Margery Nainby* might reasonably expect "with an apprentice to the said trade; that then this obligation "to be void, otherwise to be and remain in full force and virtue "in law." *Quibus lectis* they plead that the defendant *Elizabeth* entered into the service, and continued from the time of the bond to 28 *April* 1724, that the plaintiff continued to live in *Drury-lane* to the bringing the action, and exercised her trade there, and that the defendant did not set up the trade, or instruct any body, within the bounds mentioned in the condition. To this the plaintiff replies, that the defendant *Elizabeth* took the other defendant to husband, and did within half a mile of the plaintiff's house in *Drury-lane*, instruct her husband in the trade upon which they are at issue, and it is found for the plaintiff, and on a writ of error in *B. R.* the general errors are assigned.

Strange pro quer' in errore, argued, that this is a void bond, and consequently the judgment given upon it for the plaintiff is erroneous, and ought to be reversed. I take the law to be so fully settled upon this head of contracts in restraint of trade by the case of *Mitchel* v. *Reynolds* (which was in this court, *Hil*, 11 *Ann*.) that I shall not attempt to dispute the authority of that case, or to revive the distinction which before was given into between a bond and a promise; but taking the law to be, as it was settled by the several distinctions made use of in the judgment of the court in that case, I shall only endeavour to shew, that the case at bar is widely different from the case of *Mitchel* v. *Reynolds*, and does not fall within the reasoning upon which the bond in that case was supported.

1 P. Will. 181. 10 Mod. 27. 85. 130. Fort. 296. S. C.

In order to do this it will be necessary, to recite what the condition of the bond was in that case. It recited that the defendant

ant had affigned to the plaintiff a leafe for five years of a bakehoufe in *Liquorpond-ftreet* in the parifh of *St. Andrew, Holborn*; if therefore the defendant did not exercife the trade of a baker in that parifh during the faid five years, the bond was to be void. And it was refolved by the court on folemn argument, that in all cafes of reftraint of trade, where nothing more appears, the law prefumes it to be bad: and that in order to make it good, it muft appear to be confined to a particular place, and upon a confideration moving from the obligee to the obligor. And that all general reftraints are void, whether by bond, covenant or promife, and though with a confideration; and fo are alfo all particular reftraints where there is no confideration: (and to fupport this were cited 2 *Cro.* 596. 2 *Bulft.* 136. *Allen* 67. *Cro. Eliz.* 872.) So that taking this cafe for law, in order to fupport this bond, it muft be fhewn, that it is upon a good confideration, and that the reftraint is confined to a particular place.

But I hope to fatisfy your Lordfhip, that here does not appear to be any confideration to induce the obligor to part with his natural liberty: or if there fhould be a confideration, that yet the reftraint is general, and confequently that the bond is void upon that account.

As to the confideration, your Lordfhip will obferve, that in the cafe of *Mitchell* v. *Reynolds* it appeared there was an actual affignment of the leafe before made: whereas here the confideration is *in fieri*, the bond only fays that the plaintiff *is to take* the defendant into her fervice: here is nothing whereby the defendant can compel the plaintiff to do it; fo that upon the foot of this agreement the defendant is laid under a reftraint, though fhe is never received into the fervice of the plaintiff, or gains that inftruction in the trade, which is to be the confideration for laying herfelf under this reftraint.

Every confideration is either executed, or executory. In *Carter* 139. it is defined to be a meritorious caufe, requiring a mutual recompence in fact or in law. Upon the face of the bond it appears not to be a confideration executed; and that which I cannot compel the performance of, can never be efteemed an executory confideration. Unlefs I can compel the party to perform the act, it is as no confideration in the eye of the law, which will never fuffer me to part with fo valuable a privilege, and at the fame time ftand to the courtefy of another, whether I fhall have any thing for it or not; there ought at leaft to have been a mutual covenant. But it will be objected, that this want of a confideration executed upon the face of the bond is cured

by the plea, which ſhews that the defendant did afterwards enter into the ſervice of the plaintiff, and continued there for ſome time. I admit the plea to be ſo, but that is not enough. This caſe muſt be taken as it ſtood at the time of executing the bond, and is not to be made better or worſe by matter *ex poſt facto.* Your Lordſhip muſt determine upon the face of the bond, whether it be good in point of law or not; and as the defendant could not be received to aver againſt a conſideration if it had been recited, ſo neither can the plaintiff be received to ſupport her bond by any thing that does not appear in the inſtrument itſelf. Nay, if the plaintiff was to pray in aid of our plea, yet upon that it does not appear the whole conſideration is performed; for by the condition the plaintiff was to inſtruct her for three years, and if it is taken upon the plea, it appears ſhe was not there ſo long. In *Yelv.* 49. it is held, that where the conſideration is *in fieri,* a ſtrict performance muſt be ſhewn.

But whatever ſhould be your Lordſhip's opinion upon this part of the caſe, with regard to the want of a conſideration; yet I apprehend the bond will be void upon another account, as being a general reſtraint. The firſt part of the reſtraint is indeed only particular: the defendant is particularly reſtrained from ſetting up the trade within half a mile of the dwelling houſe of the plaintiff in *Drury-lane,* So far it may be good: but then it is added, *or any other houſe that ſhe the ſaid* Margery Nainby, *her executors or adminiſtrators, ſhall think proper to remove to:* this makes it a general reſtraint, becauſe it puts it in the power of the plaintiff, to prevent the defendant from exerciſing the trade in any part of the kingdom.

The reaſon why particular reſtraints are allowed is, becauſe the publick is not concerned, ſo long as the party exerciſes the trade ſomewhere. But if it tends to prevent the exerciſe of it any where, it is not to be endured; becauſe the publick loſes the benefit of the party's labour, and the party himſelf is rendered an uſeleſs member of the community. I beg leave to put the caſe, that the defendant in order to comply with this bond ſhould take a houſe and ſettle herſelf at a mile's diſtance from the plaintiff, and get into buſineſs there; would it not be exceeding hard, that the plaintiff ſhould have it in her power, maliciouſly to deprive her of this, by removing it into her neighbourhood, or even by making a perſon in that neighbourhood her executor; for ſo the bond is, that ſhe ſhall not exerciſe the trade within half a mile of the habitation of the executor or adminiſtrator. Nay, the bond may be forfeited notwithſtanding all the caution in the world on the defendant's ſide, for the plain-

tiff

tiff may come and live in that neighbourhood before the defendant has notice, or any time to remove.

Another difference between this cafe and that of *Mitchell* v. *Reynolds* is, that that was confined to the fetting up the trade as a mafter, but the defendant here is reftrained even from getting her livelihood as a fervant. In one the reftraint was for five years only, in the other it is indefinite. Suppofe the defendant fhould after leaving the plaintiff's fervice, be bound out as an apprentice to a linen draper in the plaintiff's neighbourhood (as fhe may againft her confent) is it reafonable, that the act of the juftices, which fhe cannot prevent, fhould make her liable to the penalty of this bond?

In the cafe of *Mitchell* v. *Reynolds*, it was urged for one reafon againft the allowance of a general reftraint, that it was to fix a difadvantage on one fide, without a benefit to the other; for though it may be for my benefit, that one of the fame trade fhould not come and fet up by me; yet it can be of no advantage to one in *London*, to reftrain another from exercifing the fame trade in *York*. Now this reftraint is to operate even after it ceafes to be any benefit to the plaintiff, for the defendant cannot exercife the trade in *Drury-lane* though the plaintiff fhould die or leave it off; for the words about carrying on the trade are confined to any other houfe fhe fhall remove to in order to carry on the trade: but as to the houfe in *Drury-lane* the reftraint is to take place whether the plaintiff ufes the trade or not, or even though fhe fhould not fo much as live in that place.

I fhall add but a word more, and that is as to the replication and verdict. The replication is, that fhe inftructed her hufband within half a mile of the plaintiff's houfe in *Drury-lane*, and fo is the verdict: but it does not fay he carried on the trade within half a mile. The man might live many miles off, and yet the wife might talk with him at the plaintiff's door about the trade, and that would never be a forfeiture of the bond. And yet notwithftanding the verdict, this might be all that was done by the defendant's wife.

Upon the whole, therefore, I muft fubmit it, that here is no confideration appearing upon the face of this bond, fo as to eftablifh it within the reafoning of the cafe of *Mitchell* v. *Reynolds*: that it is likewife void within the refolution of the fame cafe, as being a general reftraint, even though there fhould be a confideration: and therefore I pray that the judgment given below in favour of this bond may be reverfed.

2 *Whitaker*

Whitaker Serjeant *contra*. The bond appears to have been taken at the requeſt of the obligor in lieu of 100*l.* which the plaintiff would otherwiſe have had with an apprentice. I do not think myſelf obliged to maintain every part of the condition of this bond; I am afraid if the breach had been aſſigned upon the *elſewhere*, or upon the clauſe which ſpeaks of executors and adminiſtrators, it might be difficult to ſupport it: but what I rely upon as an anſwer in this caſe is, that the condition is good as to that part whereon the breach is aſſigned. This is not a bond which is made void by ſtatute; but if any part of it is void, it is ſo at common law; and therefore according to the caſe in *Hob.* 14. it is ſufficient to maintain the action, if the breach be aſſigned upon that part which is good.

As to the objection to the replication. We have followed the words of the plea, which will therefore be well enough.

Et per curiam, Here is a plain and a reaſonable conſideration for ſo much of the reſtraint as the breach extends to, which is no more than what was determined to be good in the caſe of *Mitchel* v. *Reynolds*. As to there being no covenant on the part of the plaintiff to inſtruct her, it is reaſonable to ſuppoſe there was another diſtinct bond; though if there was not, yet the bond being accepted by the plaintiff would be a good evidence of the agreement.

The diſtinction out of *Hob.* 14. is certaintly right. The agreement is a very reaſonable one; for it is to give her the benefit of the trade, whenever ſhe will pay what ſhould have been given with her as an apprentice. The judgment of *C. B.* muſt be affirmed (1).

22 *February* 1727. on error in parliament the judgment was affirmed. There we took it up upon the general reaſon of the law, without regard to the caſe of *Mitchel* v. *Reynolds*. The twelve Judges all attended, and were unanimous for affirming.

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(1) *Clerke* v. *Comer*, *Caſ. temp. Hardw.* 53. *Davis* v. *Maſon*, 5 *Term Rep.* 118. S. P.

Toms et al' *verſ.* Mytton.

At Weſtminſter coram Raymond *C. J.*

IN trover by the aſſignees under a commiſſion againſt *Albertus Burnaby*, it appeared he was a bankrupt in *January* 1724. and the debt of the petitioning creditor was a note dated in *September* 1725. And the Chief Juſtice was of opinion, it was a void commiſſion, the acts of a man after an act of bankruptcy being void. So the plaintiffs were nonſuit (1). *Strange pro quer'.*

A debt contracted after an act of bankruptcy is no ground for a commiſſion.

(1) *De Golls* v. *Ward*, *Forreſt* 243. *contra.* But determined upon the *old acts*. See *Ambroſe* v. *Clendon*, *poſt*. 1042. *Ex parte Wainham*, *Co. Bank. Laws* 27. If the note had been drawn prior to the act of bankruptcy, and indorſed to the petitioning creditor afterwards, it would have ſupported the commiſſion. *Anon.* 2 *Wilſ.* 135. *Ex parte Thomas*, 1 *Atk.* 73. *Bingley* v. *Maddiſon*, *Co. Bank. Laws* 24. and ſee the caſes there cited.

Kellock *verſ.* Robinſon. [745]

At Guildhall coram Eyre *C. J.* de C. B.

IN an action by the indorſee of a promiſſory note againſt the indorſor, it appeared the plaintiff had after the indorſement received part of the drawer of the note: and it was held to be a taking upon himſelf to give the whole credit to the drawer of the note, and abſolutely diſcharged the indorſor. So the plaintiff was nonſuit (1).

Where part of a note is received of the drawer, the indorſor is not to be reſorted to for the reſt.

(1) *Taſſel* v. *Lewis*, 1 *Ld. Raym.* 744. acc.

Laferre *verſ.* Johnſon.

Idem *verſ.* Emily.

ERROR of an award of execution againſt the defendants as bail on a writ of error: and it was objected by *Strange*, that the 16 & 17 *Car.* 2. *c.* 8. has a proviſo, that bail ſhall not be required of executors or adminiſtrators; and this being upon a judgment againſt an executor, the court had no power to take ſuch a recognizance.

Tho' executor is not obliged to give bail on error, yet the court may take it. L. Raym. 1459. S. C.

Sed per curiam, Though they could not require the defendant to give bail; yet if he will fubmit to do as other defendants do, the court may take it, and it will bind the parties. The defendant in the action might for fome other advantage agree to give bail on the writ of error: but be that as it will, here is a recognizance, which is not fulfilled; therefore the *fcire facias* is proper, and the award upon it muft be affirmed.

Dominus Rex *verf.* Inhabitantes St. Thomas in Southwark.

Preacher at meeting-houfe not liable to poor's rate.

ONE *Read* was charged to the poor's rate in refpect of his being an occupier of a meeting-houfe where he preached, and on appeal to the feffions they difcharged him, and the order being brought up by *certiorari*, it was confirmed. 1. Becaufe as a preacher he is no more chargeable as an occupier than any of his audience (1); it is not ftated, that he let out pews, fo as to make him a perfon that occupies and reaps a profit from it (2). 2. If he was liable, yet it muft be exprefsly alleged, and the charging him in *refpect of his being an occupier* is too uncertain (3).

(1) The principal cafes in which lands and tenements have been held not rateable for want of a *beneficial occupier* are *Rex* v. *The Occupiers of St. Luke's Hofpital*, 2 *Burr.* 1053. 1 *Black. Rep.* 249. S. C. *Eyre* v. *Smallpace*, *ib.* 1059. *Rex* v. *Inhabitants of St. Bartholomew the Lefs*, 4 *Burr.* 2435. *Rex* v. *Peter Waldo*, *Cald.* 358. *Lord Amherft* v. *Lord Sommers*, 2 *Term Rep.* 375. *Rex* v. *The Commiffioners of the Navigation of Salterfhad Sluice*, 4 *Term Rep.* 730. *Nol. Rep.* 90. S. C. *Rex* v. *Jacob Woodward*, 5 *Term Rep.* 79. *Nol. Rep.* 16[illegible]. S. C.

(2) That this would make him rateable *vide Robfon* v. *Hyde*, *Cald.* 310.

(3) *Rex* v. *Occupiers of St. Luke's Hofpital*, 2 *Burr.* 1063.

[746]

Dominus Rex *verf.* Inhabitantes de Portfmouth.

A fervant before 3 & 4 *W.* & *M.* needed not be hired for forty days.
2 Seff. Ca. p. 125. No. 117. Ca. of Sett. and Rem. p. 123. No. 167. Fort. 328. S. C.

IN 1690. it was ftated, that a perfon was hired by a captain, who was quartered at *Portfmouth* as a weekly fervant; and that he continued there forty days, and was muftered as a common foldier: and this being before the act 3 & 4 *W.* & *M.* c. 11. the queftion was, whether there fhould not have been a hiring for forty days and notice. As to the notice it was held not to be neceffary on the authority of the cafe *Rex* v. *Warminfter*, *ante* 470. And as to the retainer, it was held that it need not be for forty days, but that a continuance forty days under any retainer was fufficient. But the court quafhed the order, becaufe it was not faid that he ftaid as a fervant forty days; on the contrary it appears he was muftered as a foldier, and there can be no intendment either way.

Between the Parishes of Paulsbury *and* Woodon.

UPON a special order of sessions the case appeared to be, that a man with his wife and child were settled in *Paulsbury* at his death: after which the wife removed to a copyhold of her own in *Woodon*, and carried the child being fourteen years old with her, and it lived there many years. And now it came to be a question, where the child was settled; and the justices adjudge, that it gained no settlement with the mother, and therefore send it back to the father's settlement in *Paulsbury*.

A child may gain a new settlement with the mother after the father's death. L. Raym. 1473. 2 Seff. Ca. p. 124. No. 116. Fol. 296. Fort. 328. 1 Barnard B. R. 11. S. C.

And upon consideration the court quashed the order, saying it had been adjudged to be settled with the mother, *Mich.* 1 *Geo.* between the *Parishes of St. George* and *St. Catherine* (a). But said if it had been *res integra*, they should have doubted, whether a settlement gained under the head of the family, could be divested by a derivative one from the inferior (1).

(a) Vide this case reported in L. Raym. 1474. 1 Seff. Ca. 73. pl. 69. Fort. 218.

(1) *Rex* v. *Barton Turfe*, *Burr.* *S. C.* 49. *Rex* v. *Oulton*, *ib.* 64. *Rex* v. *Long Wittenham*, 2 *Bott by Const* 41. *pl.* 68. S. P.

Swayne et al' *vers.* Wallinger.

At Guildhall coram Eyre *C. J.*

A Commission of bankruptcy issued in 1726. and the debt of the petitioning creditor appeared to be a promissory note in 1714. And the Chief Justice allowed it to be good, saying that though six years were passed, he could not presume it to be barred (1). *Strange pro def'.*

Note of above six years standing ground for commission of bankrupicy.

(1) *Quantock* v. *England*, 2 *Black.* 703. *Fowler* v. *Brown*, *Co. Bank. Laws* 15. S. P. For the debt still exists, and no one but the debtor can avail himself of the statute of Limitations. But where the bankrupt himself applied to set it aside upon this ground, it was done. *Anon. Mosely* 37. and see the reasoning of the judges in *Bickerdike* v. *Bollman*, 1 *Term Rep.* 405.

Sir William Saunderson *vers.* Brignall. [747]

At Guildhall coram Pengelly *C. B.*

THE plaintiff brought an action of the case for fees due to him as usher of the black rod, and obtained a verdict. *Strange pro def'.*

Fees to usher of black rod recovered. 12 Mod. 607.

Dominus Rex *verf.* Johannem Ward, Arm'.

Forging a receipt for goods which defendant is bound to deliver is punishable at common law. If the information charges that *A. exiftens onerabilis* to deliver &c. did with intent to defraud, forge an indorfement &c. it is fufficient, for it is not neceffary to fhew an actual prejudice, a poffibility is enough.
L. Raym. 146. S. C. much fuller.
1 Barnard. B. R. 10.
Raym. Ent. 538.

AN information was exhibited in the name of the Attorney General, charging that Mr. *Ward exiftens onerabilis* to deliver to the Duke of *Bucks* 315 tun and one quarter of allum *ad certum diem jam præteritum*, did with intent to defraud him thereof, forge an indorfement on the back of a certificate in the words and figures following, "Mr. *John Ward*, I hereby order "you to charge 660 tuns and one quarter of allum to my ac- "count, part of the quantity here mentioned in this certificate, "and for your fo doing this fhall be your difcharge. *Bucking- "ham, April* 30, 1706." The information likewife charges a publication of it knowing it to be forged. Upon Not guilty pleaded, it was tried at the bar, and a verdict found for the King in *Eafter* term 12 *Geo.* The defendant abfconded till the laft day of *Michaelmas* term, when he voluntarily came into court and defired to be bailed: but the court refufed it, and fo he was committed.

And now in *Hilary* term his counfel (Mr. *Hungerford*, Mr. *Ketelbey*, Mr. *Filmer*, Mr. *Bootle*, and Mr. *Strange*) took fome objections in arreft of judgment, and what they principally relied upon were thefe,

(*a*) Hawk. P. C. c. 70. f. 11. p. 339.

1. That this is not fuch a paper, of which a forgery could be committed at common law. This is laid as an offence at common law; and *Hawkins* in his *Pleas of the Crown* 182 (*a*) fays, that it muft be of a matter of record, or any other authentick matter of a public nature, as a deed or will: other writings of an inferior nature, as forging the hand of authority to receive rent, counterfeiting a letter made in another man's name, *&c.* are (fays he) more properly punifhable as cheats on the 33 *H.* 8. *c.* 1. In *Cro. El.* 166. it is held not actionable, to fay, "You have falfe- "ly forged your father's hand, and thereby falfely have procured "your father's tenants to pay their rent to you;" becaufe it would not be forgery, if he had done fo. 1 *Roll. Abr.* 66.

2. It does not appear he was chargeable to deliver the allum at the time he did the fact. *Exiftens onerabilis* is at the time of the information (1), and then it wants one neceffary ingredient

(1) The information was thus, "*Memorandum*, That the Attorney General Wednefday *proxime, poft tres Trin.* 11 *Geo.* (which was in *Trin.* term 1725) comes and informs the court that the defendant *onerabilis exiftens ad deliberandum* 315 tons of allum to the Duke of *B. ad certum diem jam præteritum*, he the faid defendant contriving and intending the faid Duke of the faid allum to defraud, *et ea intentione* to avoid the delivery of the faid allum, 1 *Feb.* 11 *Geo.* (which was in *Feb.* 1724) forged the faid indorfement," &c. 2 *L. Raym.* 1466.

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to make it a forgery at common law, which is that it be to ſomebody's damage.

Mr. Attorney, Mr. *Lee*, Mr. *Marſh*, Mr. *Fazakerley*, and Mr. *Verney*, *e contra* argued, that this was a forgery at common law; and that it was the higheſt reflection upon the law, to imagine there was a time, wherein ſuch a fact as this was not puniſhable by the law of *England*. As to the paſſage in *Hawkins*, it is not warranted by the authorities quoted in the margin, and he has laid it down much too large. *Sti.* 12. is an indictment at common law, for forging letters of credit to raiſe money, and no body imagined it did not lie; and there it is not laid that he actually received money upon it, which makes the caſe an anſwer to both exceptions. 5 *Mod.* 137. *Salk.* 342. Indictment for forging a bill of lading. 1 *Sid.* 142. Counterfeiting a protection from a member of Parliament. *Salk.* 406. *Hil.* 32 *Car.* 2. *rot.* 35. *Rex* v. *Sheldon*, for forging a bill of exchange. *Ray.* 81. The like for forging a warrant of attorney. *Mich.* 6 *Geo. Rex* v. *Ward* (a brother of the defendant). Indictment for forging a promiſſory note, and laid at common law; and never imagined it was not an offence; and the defendant was convicted. 1 *Sid.* 71. 3 *Leon.* 170. is for forging the entry of a marriage. It could not be an indictment as a cheat on the 33 *H.* 8. becauſe there muſt be an actual *obtaining*, upon that ſtatute.

As to the *exiſtens onerabilis*, it is not neceſſary to ſhew an actual damage, a poſſibility of damage is ſufficient. There was no money raiſed in the caſe in *Stiles*. And if it was a bond, the party cannot be hurt by a forged one, and yet the forger ſhall be puniſhed. The jury have found that it was done with deſign to avoid the delivery, and defraud the Duke, which is ſufficient. But to take it as ſtrong as poſſible, and make *exiſtens* relate to the time of the information; yet ſurely it will be a forgery, though done before the time was actually come in which he was to deliver it. If a man is to pay money at a future day; ſhall his forging a releaſe before the day, and keeping it by him till the time comes to make uſe of it, be no crime? If it imports a prejudice, it is a crime at common law. *Mo.* 619. *Noy* 99.

1 L. Raym. 527. Salk. 375.

To this it was replied by Mr. *Ward's* counſel; that no caſe was cited where it was determined to be an offence at common law, and the precedents cited paſſed *ſub ſilentio*. That there was no reflection on the law, for this ever was puniſhable, though not as a forgery, but a cheat: they did not ſay it was *no* crime, but it was not *this*. That this was an *obtaining* within 33 *H.* 8. becauſe he obtains a right to keep that allum, which otherwiſe he

would be obliged to deliver to the Duke. And the preamble of 5 *Eliz. c.* 14. which takes notice of thefe offences, and calls them *notable* ones; yet complains of the mild punifhment that was inflicted at common law, which is an argument they were not punifhed as forgeries.

Per curiam, As there is no judicial authority on either fide, we muft take it up upon the reafon of the thing. There is no reafon why this fhould not be punifhed as a forgery, as well as if it was a deed; the injury may be as great, or greater, for the value may be 100,000 *l.* in one cafe, and a deed perhaps affect only a fingle acre of land. The ftatute 5 *Eliz.* fhews this to be a crime, by ufing the word *writings*, in contradiftinction to *deeds*. It cannot be profecuted as a cheat at common law, without an actual prejudice, and that is an *obtaining* on the 33 *H.* 8. The cafe cited out of *Cro.* is not law, and furely thofe words are actionable. *Regina* v. *Travers* was forging an indorfement on an army debenture, and laid as at common law. The reafon why we do not meet with ancient determinations is, becaufe perfonal credit was formerly fmall, and thefe writings not made ufe of. It is not neceffary to fhew an actual prejudice, a poffibility is enough; and here it appears, there would have been one, if the forgery had ftood (2). *Judicium pro Rege.*

Afterwards he was fentenced to ftand in the pillory before *Weftminfter-hall* gate, (which he did) to pay 500 *l.* and find fureties for feven years, and commitment till all was performed.

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(2) It was likewife objected, 1. That it was not fhewn how the defendant was chargeable to deliver the allum; whether it was by obligation, deed, &c. But it was over-ruled, the forgery being the gift of the information, and this but an inducement. 2 *Ld. Raym.* 1468. 2. That the word *tons* in the certificate imported a meafure by weight, whereas *dolium* fignified a liquid meafure, but over-ruled for it fignifies a ton. *Littleton's Dict.* *Townfend's Prepar.* 145. 2 *L. Raym.* 1460. 1 *Barnard B. R.* 10. 3. The information ufed *Contrafecit* inftead of *Contrefecit* but held good. *Co. Intr.* 360. 2 *L. Raym.* 1468. 1 *Barnard. B. R.* 10. 4. That the inftrument was not laid to be *publifhed* as well as *forged*. *Sed non alloc.* for the forgery was punifhable though the party was not actually prejudiced by it, if he might be fo. 2 *L. Raym.* 1469. 1 *Barn. B. R.* 10. 5. That there was no entry on the record that proclamation was made *if any body would inform the King's juftices, &c.* but over-ruled for that it is only for the benefit of the King. *Coke Intr.* 353. *b.* 2 *L. Raym.* 1469. 6. A difagreement between the *venire* and the *diftringas* in the one, the iffue being joined between the King and the defendant, in the other between the Attorney General and him, but over-ruled. 1 *Barnard. B. R.* 10.

Dominus Rex *verſ.* Robertum Mann. In Scaccario.

UPON 5 *October* 7 *Geo.* Mr. Baron *Price* granted his *fiat* for an extent againſt *Daniel Norcott* and *Joſeph Norcott*, whereupon an extent was taken out into *London*, *teſte* 6 *July anno* 6 *Geo.* which was the laſt day of the *Trinity* term preceding, and it was ſubſcribed at the bottom of the writ *fact' per warrant'* *Baron Price*, *dat'* 5 *die Oct' anno* 7 *Regni Regis*. Upon this extent an inquiſition is taken, and ſeveral goods and debts are found: and then the defendant *Mann* comes in and claims property in the debts and effects; and to make it out he firſt prays *oyer* of the bond entered into by the *Norcotts* to the crown, which appears by the condition to be a ſecurity for *Jeay* and *Dowſe* as receivers general of the county of *Huntington*. Then he prays *oyer* of the extent and the *fiat*, *quibus lectis*, he pleads, that by the courſe of the Exchequer theſe writs have time out of mind iſſued out of term by virtue of a baron's *fiat*, and not otherwiſe; that the *fiat* in this caſe was granted 5 *October*, and not before, and that the writ of extent *in rei veritate* iſſued the ſaid 5 *October*, and not before. That the ſeveral perſons named in the inquiſition to be debtors to the *Norcotts* were ſo indebted long before the extent, and at the time of the act of bankruptcy after mentioned, and that the *Norcotts* before and at the time of the ſaid bankruptcy were poſſeſſed of the effects found by the inquiſition, and being ſo poſſeſſed of thoſe debts and effects, and the *Norcotts* having for ſeveral years been goldſmiths and partners, they became indebted to the defendant *Mann* and others in 500 *l.* and 3 *October* 7 *Geo.* withdrew from their houſe for fear of being arreſted for juſt debts, and with intent to defraud their creditors, and thereby committed an act of bankruptcy. That upon the ſame 3 *October* a petition was exhibited by the creditors, and a commiſſion of bankruptcy iſſued againſt the *Norcotts*, *teſte* 3 *October*, *anno* 7 *Geo.* upon which the commiſſioners met the next day, and found them to be bankrupts; and that they being poſſeſſed of the effects and intitled to the debts mentioned in the inquiſition, the commiſſioners the ſame 4 *October* aſſigned to the de-

An extent cannot be antedated but muſt bear *teſte* at the day it iſſues, though it be out of term, for it iſſues out of the equity ſide of the Exchequer which is always open. *Quære* whether this can be taken advantage of upon plea, being an averment contrary to the record. But the writ will be ſuperſeded on motion as irregular. *Oyer* of the Baron's *fiat* cannot be had, but being upon the writ the court are bound to take notice of it. In a proceeding upon an extent *teſted* 6 *July* againſt the ſurety of a debtor of the crown, an inquiſition taken of ſeveral goods and debts found; the defendant claims property in the debts and effects and pleads that the *fiat* was granted 5 *October*, at which time the extent in reality iſſued; that the ſurety had committed an act of bankruptcy, and had been declared bankrupt, and a proviſional aſſignment of all his goods, debts, &c. made to defendant under the commiſſion prior to the extent; and then traverſes that at the time of the inquiſition the perſons therein named were debtors to the party, or that he was entitled to the goods mentioned in the inquiſition, this traverſe is proper and neither immaterial nor double. A commiſſion of bankruptcy and aſſignment is a good bar to an extent at the ſuit of the crown *teſted* ſubſequently (1). Bunb. 164. The argument of Mr. *Strange*, *pro defendente*, Gilb. Chan. Rep. 228.

(1) *Vide Braſſey* v. *Dawſon*, *poſt* 978. But if the date of the aſſignment and teſte of the writ are upon the ſame day, the crown ſhall be preferred. *Park. Rep.* 126. *Rex* v. *Earl*, *Bunb.* 33.

 fendant

fendant all the goods, chattels, debts and effects of the *Norcotts*, in trust for himself and the other creditors, by virtue whereof the defendant was possessed, and so continued till the sheriff seized on the extent: and then traverses, that at the time of the inquisition the persons therein named were debtors to the *Norcotts*, or that the *Norcotts* were intitled to the goods mentioned in the inquisition, wherefore he prays an *amoveas manus*. To this plea the Attorney General demurs, and shews for cause, that the defendant ought not to have had *oyer* of the *fiat*, and that the traverse is double; and the defendant joins in demurrer.

Bootle pro Rege argued, that this was an ill plea both in form and substance; and as to the form,

1. That the traverse was immaterial, the former matter set forth in the plea confessing and avoiding the crown's title, upon any part of which matter the crown might take issue. *Dy.* 366, *Mo.* 551. Or if a traverse was necessary, yet the first traverse covers the whole, and there was no occasion for the second.

2. The *fiat* is not material, and it is what the defendant ought not to have *oyer* of. 7 *E.* 4. 8. 10 *H.* 7. 18.

3. It is improper, to plead that a writ issued at a time which is contrary to what the writ itself imports. 1 *Sid.* 271. The *fiat* is only to controul the clerks, but has no operation as to the *teste* of the writ; the emanation of it is the act of the court, [751] and not of a single baron; and if a writ issued without any *fiat*, yet it would fall within the rule; *Fieri non debet, factum valet*; like the case of an execution whereon the sheriff breaks open doors, the execution is well executed, though the sheriff has done more than he can warrant.

As to the substance of the plea, I do insist that the court may antedate an extent, and this extent bearing *teste* 6 *July*, will bind the goods from that time, 8 *Co.* 171. and then it over-reaches the bankruptcy and assignment. This is no more than what is done every day in the case of the subject, who takes out his execution *teste* the last day of the preceding term; and which had the same effect at common law, to bind the goods from the *teste*, as the execution of the crown has now. The King's prerogative is *ab origine legis*, *Godb.* 250. and he might take the body of his debtor, though the subject could not, till the writ of *capias ad satisfaciendum* was given by statute. He might break open a house on his execution, which could not be done upon an execution at the suit of a subject. 5 *Co.* 91. Sir *T. Jones* 234. He might

grant

grant a protection against any subject's demands upon the King's debtor, till the debt of the crown was satisfied. *F. N. B.* 28: *Regist.* 281. And if in this case he might have granted the *Norcotts* a protection, the other creditors are not in a worse condition upon this extent. The court of Exchequer is a court of revenue, and must issue such process, and of such *teste*, as the nature of the case requires. 41 *E.* 3. *Fitzh. Ex.* 38. *Dy.* 197. 45 *E.* 3. *Fitzh. Decies tantum* 12. *Godb.* 290. In *Dy.* 67. an extent came before a *liberate*, and the sheriff was directed to prefer the King. Before the statute of frauds and perjuries the subject had the same right, which the crown (as not being bound by the statute of fraud) retains to this day, *Cro. El.* 174. 1 *Leon.* 304. *Cro. El.* 440. *Mo.* 21, 873. and should over-reach any sale, though for a valuable consideration. 1 *Sid.* 271. Or even though the party was dead. 1 *Mod.* 188. 1 *Leon* 245. *Trin.* 11 *W.* 3. *B. R. Oats* v. *Dr. Woodward* *Trin.* 9 *W.* 3. *B. R. Pennoir* v. *Brace.* Are not the inconveniences in those cases as great as in this?

L. Raym. 766, 849. Salk. 87, 116. Holt. 401. S. C. L. Raym. 244. Comb. 441. S. C.

But it should be doubted, whether this writ could be thus issued at common law; yet I apprehend that by the statute 33 *H.* 8. *c.* 39. § 7, 8, 25. the court have this power. It is left to them, to issue process for the King's debt according to their discretion; the words, after giving instances, are *or otherwise at their discretion.* This is a case wherein to exercise that discretion; it appears the crown is to be over-reached by these hasty proceedings upon the commission, which will have this consequence, to sweep away the effects, and totally exclude the King, who cannot come in and prove his debt upon the commission; and the only fence we had against those quick proceedings was, by testing our writ backward. A debtor might be protected for two years, *Regist.* 281. we only carry it back for three months. In *Hardr.* 125. a *diem clausit extremum* was made *teste* the last day of the precedent term, and held right; and in *July* 1712, *Regina* v. *Ellins et Farringdon*, an extent was ordered to be made out *teste* 8 *November* 1711.

[752]

This, in its nature, is a case of great consequence to the crown, and will, in many instances, be of dangerous tendency, if the crown cannot have the liberty of fencing against these expeditious proceedings upon commissions, which are taken out without notice, by making the process in such a manner as shall secure the debt of the crown. Therefore the plea being ill, both in form and substance, I pray judgment for the King.

Strange contra, It is truly said, that this is a matter which very much concerns the crown in point of revenue, and that your

Lordſhip will at all times, and upon all occaſions, take particular care of the prerogative: but I may be admitted at the ſame time to obſerve, that this is a caſe too, wherein the property of all the ſubjects of *England* is very highly affected; for if the practice which is now contended for, be allowed to prevail, no man can be ſafe in tranſacting with another, who has any thing to do with the money of the crown.

The caſe has been fairly opened by Mr. *Bootle* as it ſtands upon the record; and as to the objection, that we are improper to take advantage of the antedating the extent, upon a plea, as averring againſt the record, which imports it to have iſſued on the 6th of *July*; I muſt own I am a little ſurprized to find that matter ſo ſtrongly inſiſted upon, after what has already paſſed in this cauſe. It is in the memory of every body who attends this court, how much we preſſed to have this writ ſuperſeded, as a writ that had irregularly iſſued; and we then offered the diſtinction betwen an erroneous, and an irregular proceeding, that one might be taken advantage of by writ of error, or by plea, and that the other (which depended upon the practice of the court) was proper to be redreſſed by motion; but the court being of opinion, that we might have advantage of this matter upon a plea, we acquieſced; and having now pleaded it in conſequence of that opinion, it is very extraordinary to ſee how the argument is turned upon us by the other ſide: when we moved on the irregularity, we were told by them it was a matter we might have advantage of by plea; and now we have pleaded it, they object againſt it for that reaſon.

[153] In *Lutw.* 322. 1 *Lev.* 173. 1 *Sid.* 273. there are inſtances of theſe averments, that writs did not iſſue till a day ſubſequent to the *teſte*: I cannot ſay the judgment of the court is either way upon thoſe caſes, but ſince in this caſe the court have already given their opinion, that this was a matter pleadable, I do not think myſelf any otherwiſe concerned to anſwer this objection.

If I rightly apprehend the deſign of the court in refuſing to relieve us upon a motion, it was in order for the moſt ſolemn determination of a point of this prodigious conſequence; and ſince this was a method not invented by us, but preſcribed by the court, in order to bring that point before them in judgment; I little expected to hear a matter of form inſiſted on, when I apprehended we ſhould be confined to the merits of the queſtion; and as it was brought before the court upon record with that only view, we muſt rely upon the juſtice of the court, that we ſhall ſuffer no prejudice by putting this queſtion into one or other method of determination.

Taking

Taking it therefore for granted, that we are properly before the court upon this plea, I shall beg leave to observe, that Mr. Attorney having demurred to the plea, has thereby admitted all the facts contained in our plea, (*viz.*) that in reality the extent did not issue till 5 *October*, before which there had been a regular commission of bankruptcy and assignment: and that this is a bar to the extent appears from *Capel's* case, 2 *Show.* 480. where a prior commission of bankruptcy and assignment was held a good plea to an extent. So 2 *Roll. Abr.* 158. *G.* 2. where a subject extended lands and goods, and after seizure, but before a *liberate*, there came a prerogative writ, which had place, because there was not an actual execution of the *liberate*, as there was not likewise in the case cited out of *Dyer*; but in that case it is not pretended it would have avoided the subject's extent, in case there had been a compleat execution. Post. 97.

That these writs issue tested in vacation, is a fact nobody will deny: your Lordship's records afford a thousand instances of that nature, and none of them bear *teste* before the *fiat*, except in one instance, which I shall account for by and by: that in *Capel's* case was *teste* 24th *December*, which must necessarily be out of term.

But then it is objected, that the subject's execution bears *teste* the last day of the preceding term, and that at common law the goods were bound from that time; and why then, say they, should the crown be in a worse condition than the subject, [754] especially since it must be admitted, that the crown is not bound by the statute of frauds and perjuries.

To this I answer, that there is a very material difference between the case of the crown and that of the subject; the subject, it is true, has his writ *teste* the last day of the preceding term, because he has run through the whole course of a judicial proceeding, and his cause was ripe for execution at that time, and he can have no process *teste* out of term; whereas the King by his prerogative may have execution awarded out of term, and that in the first instance: and if he has an immediate execution upon that award, he is not in a worse condition than the subject; nay, he is in a much better, for the subject must stay till the next term, if his cause was not ripe for execution.

And this differs it from the case of a *certiorari* made out in vacation *teste* the last day of the preceding term, where there is a necessity to *teste* it in term time, it not being a prerogative writ; and besides it is of no consequence in the case of a *certiorari*, which removes all orders, though after the *teste*, so as they be before the return. And

And I take the true reason why this is not provided againſt by the ſtatute of frauds is, that it was not a practice ſo much as thought of at that time, it was certainly a caſe within equal miſchief. No doubt but there have been many occaſions to antedate extents before this; and the never doing it till now is, according to *Littleton*, a ſtrong argument againſt the legality of doing it at all. *Capel*'s caſe cited before was 2 *Jac.* 2. and even then there was no thought that it might have been *teſted* backwards, ſo as to over-reach the aſſignment, though every body knows matters of prerogative went very high at that time.

And as this is a novelty in law and practice, I beg leave, in the next place, to conſider a little what will be the conſequence of it. The goods, without queſtion will, in the caſe of the crown, be bound from the award of execution, according to Sir *Gerard Fleetwood*'s caſe, 8 *Co.* 171. Now the award of execution is, in point of time, the *teſte* of the writ; ſo that all tranſactions by the bankrupts, all ſales *bona fide* for a valuable conſideration, and all payments by them made in the way of trade, between 6 *July* and 3 *October*, will be avoided; which will introduce great confuſion.

2 Com. Dig. Debt. (G. 3.) (G. 4.) (G. 9.) 373. 4 Com. Dig. Execution. (B. 3. (B. 5.) (B. 6.) p. 117. et ſeq.

By the law the King's execution relates, as to land, from the date of the bond given to the King, and as to goods, from the award of execution; but by this means it may be made to relate to a time precedent even to the being in debt; for a debt may be contracted in vacation, and the execution, according to this new practice, ſhall iſſue before any debt. The proceſs muſt be awarded for the debt, and muſt recite the bond entered into to the [755] crown: in this caſe, indeed, it was four days old at the *teſte* of the writ; but what an abſurdity will it be, if it ſhould happen to bear date after the term? which may be the caſe. It has been thought a little hard, to make it relate, as to lands, to the date of the bond, which could not appear to a purchaſer: but it will be much harder, if it be ſuffered to relate to a time before the being in debt.

Hard. 98. 1 Will. 203, 223, 225. 2 Seſſ. Ca. 342. 3 Burr. Rep. 1755.

The practice of every court is the law of that court; and it has been ſo ſtrictly adhered to, that in the caſe of *Bewdley* a practice of ſeven years only was allowed to prevail againſt the expreſs words of an act of Parliament.

I would therefore, in the next place, conſider this writ upon the practice, and the 33 *Hen.* 8. *c.* 39. § 35. That act ſays, "That the King's proceſs ſhall be preferred, and he ſhall firſt "have execution, *ſo always that the King's ſaid ſuit be taken and* "*commenced, or proceſs awarded* for the ſaid debt at the ſuit of "the King, before judgment given for the ſaid other perſon."

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Upon this act, I take it, the suit must be said to be *then* taken and commenced, *when* the first step is made towards proceeding to execution. The first step to be taken is to procure the *fiat* of a Baron, and then it is that in fact the process is awarded; so that upon the foot of the act of Parliament, this was not a suit taken or commenced, or a process awarded, till the assignment of the defendant had taken place. It is said that the court has a discretionary power by the statute 33 *Hen.* 8. but that is only to act according to law; the statute does not leave it to your Lordship's discretion to act contrary to law, which is what is contended for by the other side. This court will take notice of its own practice, and therefore since it appears upon the record, that there was no *fiat* till 5 *October* you will take notice that such a writ as this could not issue according to the course of the court: and then, whether we can be admitted to say, that in fact it issued at a day subsequent to the *teste*, will not be material; since it appears to the court to be so without our averment.

I did mention before, that there had been one instance of antedating an extent, and that was the case of *The Attorney General* v. *Quash* in 1713. There the *fiat* was the 24th *February*, and the writ taken out upon it was *teste* the last day of the preceding term, which was 12th *February*: and after great consideration and search of precedents, that writ was set aside, upon account of the novelty and consequences of such a practice. So that, as to precedents, your Lordship will consider how the case stands. Here is a new sort of writ taken out, and the only instance of such a writ is an instance wherein it was set aside; they who would introduce this practice, are to justify it by precedents, and we say there are none on that side, but that every extent which bears *teste* in vacation is a strong precedent in our favour; since if it might have been *tested* in the precedent term, it is impossible to think so great an advantage would not have been taken. [756]

As to the precedents cited by Mr. *Bootle*, that of a *diem clausit extremum*, is nothing to the purpose, for there was a necessity to *teste* it in term, it not being a prerogative writ; and as to the case of *The Queen* v. *Ellins*, that was no more than ordering a new writ to be made out of the same *teste* and return of a former, that had been lost, and for which there was a regular *fiat*.

If this be a prerogative, it is, like all others, to be proved by usage, and yet there is no pretence of usage to support it: if the crown has engaged by *Magna Charta*, not to run upon the subject, *nisi per legem terræ*, let them shew us the *lex terræ* by which this extraordinary proceeding is to be warranted.

 And

And as to the argument drawn from other prerogatives; that the King has other prerogatives, which may be as inconvenient to the subject as this, and therefore why should he not have this; surely that is the most absurd way of reasoning in the world: we are upon a single question, whether he has this prerogative or not; and if it cannot be shewn he has, it is to no purpose to talk of protections or other legal prerogatives, which are not disputed.

There having been so great an alteration in this court since the time of the motion, it may not be improper to mention what seemed to be the opinion of the court as to the merits of this question. Lord Chief Baron *Bury*, and *Mountague*, were both of opinion, the writ was illegal, and would have superseded it; Mr. Baron *Price* and Mr. Baron *Page* indeed were for having it pleaded: but I did not observe that the opinion of either of them was, that the writ was right.

Your Lordship will consider this extent upon the foot it stood on 6 *July*, when the bond was but four days old; and if at that time there was no ground for this proceeding, it is not to be supported by matter *ex post facto*, by a mere relation and fiction of law, which ought to divest no right that has been once legally

[757] vested. For this purpose I beg leave to mention a case that was in *B. R. Trin.* 4 *Geo. Waring* v. *Dewberry*: there a landlord, who had rent due to him, died intestate, after which the plaintiff in the action sued out execution against the defendant, who was the tenant, and levied the debt upon it; after this, administration was committed to *J. S.* who thereupon came into court and moved for a rule on the sheriff to pay him a year's rent out of the money levied, pursuant to 8 *Ann. c.* 17. urging that though he was not administrator at the time of serving the execution, yet as soon as the administration was committed, it had relation to the death of the intestate, and he might bring trover for goods taken between the death of the intestate and the commission of administration. But the court held, that relations which are but fictions of law, should never divest any right regally vested in another *mesne* between the death of the intestate and the commission of administration; and that the plaintiff in the action, having duly served his execution before the administrator had a right to demand his rent, it was not reasonable the plaintiff should be defeated by any relation whatsoever: they did not in that case deny the authorities which give the administrator trover by relation, but went upon a distinction that will govern this case, between relations that are to defeat lawful acts, and such as are to punish those which are unlawful.

Ante 97.
Fort. Rep. 360.
8 Ann. c. 14.

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An objection was taken, (and indeed it is mentioned in the demurrer) that we should not have had *oyer* of the *fiat*; but if your Lordship casts your eye upon the writ itself, you will find, that is indorsed upon it, and made part of the record, and appears in their setting out the extent: in the common case it is marked at the bottom of the writ, but they were so sensible of the absurdity of a *fiat* in *October*, for a writ had issued in *July*, that in this particular instance they have deviated from the common form, and have modestly indorsed it upon the back of the writ.

The traverse is objected to; but surely that is very proper, and the crown may take issue either on the inducement, or the traverse; it was necessary to put the matter of the bankruptcy and the assignment in issue, and as we plead to the inquisition, we must traverse that which is the point of it: and it is not a double traverse, but two distinct matters; the first covers the debts, and the second the effects found by the inquisition.

Upon the whole therefore, it is certain that his Majesty has many great and valuable prorogatives; and may he long live to enjoy them in their full extent. Our own experience of the happiness of his government may assure us, that he desires only to make the law of the land the measure of his actions: and it [758] is some pleasure to observe, that this single attempt to stretch the prerogative beyond its due bounds, proceeds only from a private dispute between two co-obligors in the same bond to the crown, and wherein it was necessary to make use of his Majesty's name, though he is not at all concerned in point of interest. It is one article of the bill of rights, that the late King had under pretence of prerogative levied money on his subjects in other manner than was warranted by the laws of the land; and yet it does not appear that this practice now set up, was attempted even in that reign: and we live in times so much happier than those, that it will be sufficient to confute this doctrine, if we only shew (as I have done already) that it is an unprecedented attempt to stretch the prerogative of the crown to the subversion of the liberty and property of the subject.

Pengelly C. B. This is a matter of very great consequence to the revenue, to the method of proceeding, and to the subject. I take it to be our duty on all these considerations, to maintain the prerogatives of the crown, but not to raise any new ones:

In the case of the King v. Mann, H. 1726. in the Exchequer it was expresly laid down by Ld. Chief Baron *Pengelly*, that whoever pleads to the title of the crown found by an inquisition is obliged to traverse that title so found, and not to put the crown to traverse the title set up by the defendant, or to force the crown to take a traverse; tho' the crown has an election to traverse the inducement or title set out by the defendant. Palm. 81. Keilw. 175. a. and T. Jo. 9, 10 are to the same purpose. Park Rep. 130, 311. note to 2d. edition.

every

every prerogative that is not affected by the interposition of an act of Parliament, must depend upon prescription only, and we must have the same evidence of a prerogative, that we have of all other prescriptions.

I should have thought this a matter far more proper to be determined upon a motion, than by special pleading; for as has been observed, this is more a matter of irregularity than error, and I apprehend it never was the intent of the court, to deprive the defendant of any legal benefit, by putting him into this method; if therefore this is improper for a plea, I shall be of opinion still to turn it into a motion again, and set aside the extent as irregularly issued.

As to the *oyer* of the *fiat*, that cannot be had: but then it being set out in the very writ, it is before us, and we must take notice of it.

I am afraid we shall be under great difficulty how to do the defendant justice upon this record; we cannot give judgment for him, unless he makes out a title, which if the matter pleaded be improper for a plea, he can never do.

I think the traverses are not double: and being a plea to the title of the crown, which the defendant was bound to answer, it was proper to add the traverse, which is for the benefit of the [759] crown, by giving them an opportunity of taking issue on the traverse, or any part of the title before set forth: this is the usual way of pleading upon outlawries.

As to the principal question, whether this extent can be antedated or not: I must observe, that they issue from the equity side of the court, which is always open: if the usage has been to have a *fiat*, and *teste* the writ the day the *fiat* is granted, I should think the *fiat* was in the nature of an award of the court, which formerly sat longer than it does now; and now when it is not sitting, a *fiat* is to be had at a Baron's chamber, and that is an evidence that the writ and *fiat* ought to tally with one another.

I think the usage must determine in this case. There is no instance of antedating, where it has been allowed; for as to the case cited by Mr. *Bootle*, that was only the continuance of a writ that had regularly issued. On the other side there is the consideration that such a thing was never attempted before, and there is *Quash's* case, which is a judicial authority: that was in a manner given up at the bar by Sir *Edward Northey*, who was the Attorney General, and who was known to be enough tenacious of

Park. Rep. 281. S. C. but not S. P.

of the rights of the crown; and the court in their judgment treated the extent as a writ that had iſſued without any *fiat* or authority.

If this be a novelty it is not to be ſupported; at preſent it ſeems to me to be ſo, but it is proper to be farther conſidered.

Baron *Hale*, If this is to go againſt the defendant upon a point of pleading, it would be exceeding hard. But rather than ſo, I think the court is bound in honour to interpoſe, and turn it again into a motion. I think this is a very extravagant attempt, and have wondered ever ſince I heard of it, upon what foundation it could be ſupported. I do not now find any thing offered to that purpoſe, and think there is no ſuch prerogative as has been exerciſed in this caſe. The crown is in a very good condition by having this extent as their firſt proceſs; it is hard enough upon the ſubject, and we ought not to enlarge the prerogative.

Baron *Carter*, No ſuch writ can regularly iſſue before a *fiat*, which ought to be the direction in making the *teſte*. It is impoſſible to foreſee the ill conſequence of allowing thoſe writs to be antedated; and it is conſiderable, that in all the time this court has ſat, it never was attempted before.

Baron *Comyns*, Surely this is much properer for a motion than a plea, and it can never be determined according to juſtice upon the record. The *teſte* is matter of record, and I think we are obliged to take it to have iſſued at the time of the *teſte*, and there can be no averment againſt it. [760]

As to the ſtatute 33 *H.* 8. I think that does not leave it to our diſcretion, to alter the courſe and nature of proceedings, or to do a thing that was never done before, and may have ſuch miſchievous conſequence. *Per curiam, ulterius concilium.*

Afterwards in *Trinity* term following, I moved to ſet aſide the extents upon the point of irregularity, and Mr. Attorney General conſented, ſo nothing further was done upon the pleadings.

And *Trin.* 2 *Geo.* 2. *Rex* v. *Vanderplank*, another of the ſame nature, which had attended the event of this, was alſo ſet aſide. Bunb. 165. n. S. C. S. P.

Eaſter Term

13 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Juſtice.*

Sir John Forteſcue Aland, *Knt.*
James Reynolds, *Eſq*; } *Juſtices.*
Sir Edmund Probyn, *Knt.*

Sir Philip Yorke, *Knt. Attorney General.*
Charles Talbot, *Eſq*; *Solicitor General.*

Buck *verſ.* Atwood.

Where a deed comes in by incident, the Admiralty may try whether it was fraudulent.

THE mariners ſue in the Admiralty for wages; and a deed is pleaded to have been made at land, whereby the mariners agree to ſubject themſelves to the loſs of their wages on particular circumſtances; and it being replied thereto, that the deed was obtained by fraud and circumvention, it is ſo declared below, and a ſentence for the wages.

It was then moved for a prohibition, becauſe the Admiralty has no original juriſdiction for wages, but it is connived at for the eaſe of the mariners, who may join in the ſuit, which they cannot do at law: but then it muſt be upon a parol contract, and not a deed; and here being a deed made at land, that is the ſubſiſting contract, and will merge the other. *Salk.* 31. (*a*).

(*a*) 12 Mod. 38. S. C.
Vide poſt. 568.

Sed per Curiam, This is only a deed on one ſide, to forfeit the wages upon particular circumſtances; but will not enable them to ſue for their wages at law. The deed therefore comes in

is only by way of incident, and then they may proceed to try it. There can be no prohibition.

Macleod *verſ.* Snee.

ERROR of a judgment in *C. B.* wherein the plaintiff declares, that *A. B.* drew a bill of exchange dated 25th of *May*, whereby he requeſted the defendant one month after date to pay to the plaintiff or order 9 *l.* 10 *s.* " as my quarterly half-" pay, to be due from 24th of *June* to 27th of *September* next, " by advance." And the action is againſt the defendant upon his acceptance. What is a bill of exchange. L. Raym. 1481. 1 Barnard B. R. 12. S. C.

It was objected, that this was no bill of exchange, becauſe it is not to pay in all events, but is left to the pleaſure of the perſon on whom it is drawn, either to advance the money or not: and it was compared to the caſe of *Jocelyn* v. *Laſerre*, which was to pay out of his growing ſubſiſtence, and to the caſe of *Jenney* v. *Herle*, which was payable out of a particular fund, and in both caſes held to be no bills of exchange. Fort. 281. 10 Mod. 294, 316. Ante 591.

Sed per curiam, The quarterly half-pay is a certain fund, which the growing ſubſiſtence was not: the mention of the half-pay is only by way of direction how he ſhall reimburſe himſelf, but the money is ſtill to be advanced on the credit of the perſon. The reaſon it was held no bill of exchange in *Jenney* v. *Herle* was, becauſe it was no more than a private order to a man's ſervant. Judgment affirmed.

Stanton *verſ.* Smith.

UPON demurrer it was held actionable, to ſay of a tradeſman, *You are a ſorry pitiful fellow, and a rogue, and compounded your debts for 5 s. in the pound*; for it is in effect calling him a bankrupt. Words actionable. L. Raym. 1480. 1 Com. Dig. Action upon the caſe for defamation (D. 25.) p. 260.

Monk *verſ.* Cooper.

[763]

COVENANT for non-payment of a year's rent from *Michaelmas* 1725. to *Michaelmas* 1726. The defendant craves oyer of the leaſe, in which there is a covenant on the part of the leſſee to repair, except the premiſſes ſhall be demoliſhed by fire: and then pleads, that before *Michaelmas* 1725. the premiſſes were burnt down againſt his will, and that they were not rebuilt by the plaintiff during the whole year for which the rent is demanded, Where there is a covenant to pay rent, an action lies, though the houſe is burnt down. L. Raym. 1477. S. C.

manded, nor had he any enjoyment of the premisses; and therefore prays judgment, if he shall be charged with the rent.

8 Burr. 1638, 1640.

To this the plaintiff demurred, and it was insisted on by Mr. *Fazakerley*, that whatever may be the default of the plaintiff in not repairing, yet the defendant must in all events perform his covenant to pay the rent; and *All.* 27. was cited for that purpose.

Strange contra insisted, that this was like the case of a covenant to repair, which will not bind in the case of a tempest, which is the act of God; and *a fortiori* in this case, which is the neglect of him who is suing for the rent. 1 *Co.* 98. *a.* *Hard.* 387. 1 *Roll. Abr.* 454. *pl.* 8. And he compared this to the case of an eviction, *Perk.* § 825, 828. 2 *Vent.* 67. and to the case in 1 *Roll. Abr.* 236. where it is held, that if part of the land is drowned by the sea, the rent shall be apportioned.

Sed per curiam, The case in *Allen* 27. is express to the contrary: if the defendant has any injury, he will have his remedy; but he cannot set it off against the demand for rent. The plaintiff must have judgment(1).

(1) *Belfour* v. *Weston*, 1 *Term Rep.* 310. S. P. *Vide Pindar* v. *Ainsley*, *Sitting West. Mich.* 1767. *ib.* 312. *Doe* v. *Sandham*, *ib.* 705.

Dominus Rex *vers.* Commissioners of Sewers in Essex.

Tarde a good return to *mandamus.* L. Raym. 1479.

TO a *mandamus* to make a rate to reimburse an expenditor; they returned, that the writ was not delivered til 12 *February*, and that the commission expired in four days after, and therefore they had not time. And the court allowed the return, saying they could not grant a peremptory *mandamus*, it appearing there was now no power in any body to execute it (1).

(1) According to the report in Lord *Raym.* the commissioners also returned, that they had made a rate prior to the issuing of the writ, which when collected would be sufficient and applicable to repay him.

Warneford *verf.* Warneford.

In Middlesex coram Raymond *C. J.*

ON an iffue directed out of Chancery, *devifavit vel non*, the Chief Juftice ruled, that fealing a will is a figning within the ftatute of frauds and perjuries (1). 3 *Lev.* 1. *Strange pro quer'.* Sealing a will is figning.

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(1) *Sed quære*, for fealing was faid not to be fo in *Smith* v. *Evans*, 1 *Wilf.* 313. and fee *Gryle* v. *Gryle*, 2 *Atk.* 182.

Davers *verf.* Davers. In Canc.

A Motion was made, to infpect the exhibits proved in the caufe before hearing; but there being no inftance of any fuch order, the Chancellor would do nothing in it (1). No infpecting exhibits before hearing. 2 Wilf. Rep. 410. 2 Eq. Caf. Abr. 285. pl. 3. S. C.

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(1) *Hodfon* v. *Earl of Warrington*, 3 *P. Wms.* 34. S. P.

Trinity Term

13 Georgii Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*
Sir John Fortescue Aland, *Knt.*
James Reynolds, *Esq;* } *Justices.*
Sir Edmund Probyn, *Knt.*
Sir Philip Yorke, *Knt. Attorney General.*
Charles Talbot, *Esq; Solicitor General.*

Merryfield *vers.* Berrey.

No second *certiorari* to reverse a judgment.

THE plaintiff in error took out a *certiorari* of a wrong term, which did not verify his error; and now he moved for a second *certiorari*, which was denied; the court saying, it may be granted to affirm, but not to reverse a judgment (1).

(1) *Vide Carlton* v. *Mortagh*, 1 *Show.* 214. *Bowers* v. *Mann*, *Salk.* 269. and the cases there cited, rep. also 6 *Mod.* 113, 116. *Holt*, 295. *Price* v. *Harflong*, *post.* 819. *Berkley* v. *Howard*, *post.* 907. *Franklyn* v. *Reeves* *ante.* 119.

Hicks *vers.* Jones.

In *scire facias* 15 days with *teste* and return are good.

A *Scire facias* was *teste* 15 *May*, returnable the 29th, which is making both the *teste* and return *inclusive* of the fifteen days. And upon consideration, it was held well, and that there was

was no difference whether the proceeding was by bill or by original (1). *Salk.* 599. Sir *T. Jones* 228.

(1) That is as to the teste and return being inclusive. This was a suit by original, if it had been by bill it would have been sufficient, if there had been 15 days between the teste of the first *scire facias* and return of the second. *Elliot* v. *Smith*, *post*. 1139.

Dominus Rex *vers.* Johannem Oneby. [766]

UPON an indictment for the murder of Mr. *William Gower*, found at the *Old Bailey* in *February* sessions 12 *Geo.* the defendant being arraigned, pleaded Not guilty; and upon the trial the jury found this special verdict.

It lies upon the slayer to extenuate the fact of killing, which *primâ facie* is always murder.

If *A.* and *B.* have a sudden quarrel, and blows pass, and then there appears a sufficient time for the parties to have cooled, and afterwards *A.* kills *B.* it is murder.

It is the province of the Judge from the circumstances of the case to determine what is malice, and whether the killer had a sufficient time to cool.

If *A.* says he will revenge himself of *B.* or that he will have his blood, this is express malice against *B.* and if a killing ensues, it is murder. Ld. Raym. 1485. 1 Barnard. B. R. 17. 9 St. Tr. 14. S. C.

In capital cases it is not necessary that the joinder of issue should appear upon the record (1).

That upon the second day of *February* 1725, the prisoner and the deceased were in company, together with *John Rich*, *Thomas Hawkins* and *Michael Blount*, in a room at the *Castle Tavern* in the county of *Middlesex*, in a friendly manner. That after they had continued thus for two hours, box and dice were called for; the drawer said, he had dice but no box, and thereupon the prisoner bid the drawer bring the pepper-box, which he immediately did: and then the company began to play at hazard, and after they had played some time, the said *Rich* asked if any one would set him three half crowns? whereupon the deceased, in a jocular manner, laid down three half-penny pieces, and then said to the said *Rich*, I have set you three pieces, and the prisoner at the same time set the said *Rich* three half crowns, which the said *Rich* won: and immediately after the prisoner in an angry manner, turned about to the deceased, and said *it was an impertinent thing to set halfpence, and that the deceased was an impertinent puppy for so doing*, to which the deceased answered, *whoever called him so was a rascal.* That thereupon the said *John Oneby* took up a bottle, and with great force threw it *erga prædict' Williehnum Gower*, which bottle did

(1) *Rex* v. *Royce*, 4 *Burr.* 2084, 2085. S. P. *Trem. Ent.* 286, 287. *Purchase's* case, 8 *St. Tri.* 286, 287. 2 *Hawk. P. C. c.* 38. *sect.* 3. *p.* 563.

 not

not hit the ſaid *Gower*, but bruſhed his perriwig as it paſſed by his head, and beat out ſome of the powder, whereupon the deceaſed immediately after toſſed a candleſtick or bottle *erga prædict' Johannem Oneby*, but did not hit him with the ſame: upon which the deceaſed and the priſoner both roſe up to fetch their ſwords, which then hung up in the room, and the deceaſed drew his ſword, but the priſoner was prevented from drawing his by the company, and the deceaſed thereupon threw away his ſword, and the company interpoſing, they ſat down again for the ſpace of an hour. That at the expiration of an hour, the deceaſed ſaid to the priſoner, *We have had hot words, but you was the aggreſſor, but I think we may paſs it over*; and at the ſame time offered his hand to the ſaid *John Oneby*: to which the ſaid *John Oneby* anſwered, *No, damn you, I will have your blood.* They further find, that afterwards the reckoning was paid by the deceaſed, the priſoner, *Rich*, *Hawkins* and *Blount*; and all the company, except the priſoner, went out of the room to go home; and the priſoner remaining alone in the room, called to the deceaſed in theſe words, *Young man, come back, I have ſomething to ſay to you*; whereupon the deceaſed returned into the room, [767] and immediately the door was flung to and ſhut, and thereby the reſt of the company were excluded; and then a claſhing of ſwords was heard, and the priſoner, with his ſword, gave the deceaſed the mortal wound mentioned in the indictment, of which he died the next day. They further find, that at the breaking up of the company the priſoner had his great coat thrown over his ſhoulders, and that he received three ſlight wounds in the engagement; and that the deceaſed being aſked, upon his death-bed, whether he received his wound in a manner, amongſt ſwordſmen called fair, anſwered, *I think I did.* That from the time of throwing the bottle there was no reconciliation between the priſoner and the deceaſed. And whether this be murder or manſlaughter the jury pray the advice of the court, and find accordingly.

Upon which verdict a *certiorari pro rege* was brought, and the priſoner being at the bar, it was made a *concilium*, the court being of opinion it could not be made a *concilium* in his abſence. Poſt. 834. And in *Hilary* term 13 *Geo.* it was argued by Serjeant *Darnall* for the king, and Serjeant *Eyre* for the defendant.

Serjeant *Darnall pro rege.* In order to conſider whether this be murder or manſlaughter I ſhall premiſe that which is not to be diſputed, that every malicious killing is murder, and that malice may be either expreſs or implied. This is malice implied in the act itſelf, becauſe there was no reaſonable provocation; there was nothing but words paſſed between them, till the pri-

ſoner

foner threw the bottle at the deceafed; and it has been often refolved, that in point of law words are no provocation. But if words were a fufficient provocation, yet it appears the prifoner began with words, as well as acts. The calling Mr. *Gower* an impertinent puppy, was previous to the faying or doing of any thing by Mr. *Gower*, that could give offence to the prifoner: if the fetting of half-pence was a thing to be refented, the affront was to Mr. *Rich*, and not to Mr. *Oneby*, whofe bet to *Rich* was not at all affected by what was done by Mr. *Gower*. And that it is murder in this defendant, I think cannot be difputed after the judgment of the court in *Mawgridge's* cafe, which is in *Kelynge* 119. There the bottle thrown by *Cope* hit *Mawgridge* and broke his head: here, the candleftick or bottle toffed by *Gower* did not hit the prifoner at the bar: that was a fudden conflict, this a deliberate act, after a difpofition to peace manifefted by *Gower*, and a continuance of malice in the prifoner for above an hour after the firft conflict. What was done here by Mr. *Gower* would have been juftifiable in him, even if the candleftick had hit the prifoner; and fo it was refolved in *Mawgridge's* cafe, for there the bottle returned by Mr. *Cope* did hit the defendant and broke his head. And as the act done by Mr. *Gower* was jufti- [768] fiable in him; it follows, that it can be no foundation to excufe or mitigate the fubfequent killing by Mr. *Oneby*. The cafe put in *Kelynge* 128. of an affault by *A.* upon *B. B.* draws his fword and purfues *A.* to the wall, where *A.* in his own defence kills *B.* and it is held murder in *A.* has many ftrong circumftances in favour of *A.* which are not in this cafe.

But I apprehend, it is not neceffary to rely barely on this point, that there is malice implied in the act; fince it plainly appears upon the ftate of the cafe, that here is exprefs malice: when the deceafed was defirous to end the matter amicably, the prifoner replies, *No, damn you, I will have your blood:* this explains and goes through the whole fact, and proves the fubfequent killing to be malicious.

I do therefore infift that taking it either way, either as a killing out of malice implied, or malice exprefs, it is murder; and that this *upon the fact* is a killing of malice implied, and upon the prifoner's own words coupled with the fact, it is malice exprefs, and confequently murder.

Serjeant *Eyre pro def'*. The queftion is, what degree of homicide this is; and I apprehend it to be but manflaughter. the diftinction is, that if the killing be of malice forethought, it is murder; if on a fudden occafion, it is but manflaughter; and that I take to be this cafe.

 In

In 3 *Inst.* 51. malice prepensed is defined to be, when one compasseth to kill another, and doth it *sedato animo*: on the other hand, manslaughter is the doing it without premeditation upon a sudden brawl, shuffling or contention. 3 *Inst.* 57.

The law has ever been indulgent to the passions of men: *ira furor brevis est*, and therefore as a madman the party is excused for what he does in a sudden transport of passion: I do admit, that bare words are no provocation; but yet they will serve to explain the nature of the combat, and shew whether it was sudden or not. The calling the prisoner a rascal, was what no man of honour could put up; and as this was the beginning of the quarrel, the fighting was as sudden as the reproachful words. If the prisoner had stabbed Mr. *Gower* upon speaking the words, and *Gower* had done nothing; I believe it would have been murder; but here was a regular fight, an interchange of blows, and so it comes up to the case put in *Kelynge* 55. of a combat between two of a sudden heat, where if one kills the other, it is but manslaughter.

[769] The law has fixed no certain time when it shall be presumed the passions of men are cooled. The case in 12 *Co.* 86. must take up a longer time than this, for there the boy ran three quarters of a mile to his father, and told his story, and after that the father provided himself with a cudgel, and had as far to go in pursuit of the other boy: and there is this difference between that case, and the case at bar; that there the adversary was out of sight, but here he continued in presence, which must rather inflame than abate the passion.

The words made use of by Mr. *Gower* carry an imputation on Mr. *Oneby*, which might provoke him afresh; the telling him *he was the aggressor* was not likely to make an end of the quarrel; and that is plain from the manner in which Mr. *Oneby* understood them, who would have never said so harsh a thing to his friend Mr. *Gower*, if he had been at that time in any degree master of himself.

It is not found by the verdict, who began, after Mr. *Gower* returned into the room. It is not likely the prisoner began, because he had his great coat thrown over his shoulders; and as to the shutting the door, it is stated to be done immediately on *Gower*'s returning, and is likelier to be done by him that came into the room when the first conflict happened. It appears Mr. *Gower* was the readiest to draw his sword, it was actually drawn, and the prisoner's was not; and since it is not stated

2 who

who drew firſt the ſecond time, I think it ought to be explained by the firſt.

To make it murder in the firſt inſtance, it muſt be done with a weapon that would endanger life: the bottle in *Mawgridge*'s caſe was full of wine, and it hit him ſo violently that he never ſpake more: but for any thing appearing upon the verdict, this might be only a ſmall oil bottle uſually ſet upon tables in publick houſes. and might perhaps be empty before it was flung. The caſe of Mr. *Turner*, which is taken notice of in *Cumb.* 407. was held manſlaughter upon this reaſon, becauſe the clog was not ſuch an inſtrument, from a blow with which it was likely death ſhould enſue. But ſuppoſing the bottle to be as big and as full as *Mawgridge*'s bottle, yet no harm was done by it here, as there was in *Mawgridge*'s caſe. Here was no drawing the ſword *eo inſtante*, as *Mawgridge* did, which occaſioned the Judges to lay the returning the bottle by Mr. *Cope* out of the caſe, and conſtrue the immediate drawing the ſword, as an intent to ſupply the miſchief, which the bottle might fall ſhort of. *Mawgridge*'s caſe is materially different from this. There the intention from the firſt throwing the bottle was to commit murder, here it was otherwiſe. There the firſt bottle hit, here it [770] miſſed. There the murderous intent was immediately carried into execution, here was a long interruption. The deceaſed needed not have returned, if he had not been equally diſpoſed to combat; and he himſelf ſaid it was a fair combat, which there was no pretence to ſay in *Mawgridge*'s caſe.

Serjeant *Darnall* replied. The words on both ſides muſt certainly be laid out of the caſe; if not, *puppy* was worſe than *raſcal*, becauſe it is the name of a beaſt. If Mr. *Gower* took *Oneby* to be the aggreſſor, the condeſcenſion was the greater in him; it is no more than ſaying, I who have been injured am ready to paſs it by. I do not find it was at all relied upon in *Mawgridge*'s caſe, that the bottle was full: and as to the caſe in *Cumberbach*, the ſervant there had committed a fault, for which he was liable to be corrected: the deceaſed's declaration was only that he received the wound by a fair puſh.

The court ſaid nothing upon this argument, but appointed another to be before all the Judges of *England*. And in *Eaſter* term following it was accordingly argued by Mr. *Lee* for the King, and Mr. *Ketelbey* for the priſoner, to the ſame effect as the former argument. The priſoner not being preſent in *Serjeants-Inn*, as he was in court upon the firſt argument, (this laſt being only to have the advice of the other Judges.)

And 12 *June* following, the prisoner being brought to the King's Bench bar, *Raymond* C. J. delivered the resolution of the court.

There has been a great deal of time since the trial of the prisoner, but that has not been spent on account of any difficulty in the case, but by the parties themselves, in drawing up and settling the special verdict: it did not come before us till *Hilary* term last, since which we have heard two arguments, and are now ready to deliver our opinions.

And I do now deliver it as the unanimous opinion of all the twelve Judges, that the prisoner at the bar is guilty of murder.

The notion of murder is agreed on all hands to be, the killing another of malice prepense, that is in other words, a killing with a wicked design. The malice necessary to make the act murder, may be either express or implied; and my Lord *Hale* in his *Pleas of the Crown* (a), when he is describing what is malice implied, lays a great stress upon the manner of doing the act; and therefore puts the case of a man exercising an unruly horse amongst a multitude, where from the circumstances of the act it is highly probable a mischief may ensue.

(a) 1 H. H. P. C. 450.

[771]

If a man kills another without any provocation, this is malice implied; for the law supposes there must be some latent malice in the party, or otherwise he would not be so barbarous as to take away the life of another. It may be murder, though words, or even blows pass between them; and the case put in *Kelynge*, and cited at the bar, is certainly law; that if *A.* strikes *B.* *B.* draws and returns the assault, and *A.* kills *B.* it is murder, though *A.* was upon his defence, and though the killing was ever so sudden; and upon this principle it was, that *Mawgridge*'s case was adjudged.

It was said, that *Mawgridge*'s case was a single case, and went farther than any case before it; but I take this opportunity to declare, that we are all of opinion that *Mawgridge*'s case is law.

But as that case was adjudged murder upon the implied malice, we are all of opinion the case at bar goes farther, and that the prisoner is guilty of murder on express malice.

A general malice against any man is express malice with regard to that man. *Mo.* 86. If one man says he will revenge himself of another, (or as in this case) that he will have his blood,

blood, and a killing enfues; it is murder. Here is exprefs malice before the giving the wound. There was nothing done by the deceafed but what was perfectly innocent: he fet the halfpence to *Rich*, and not to the defendant; *Rich* did not refent it, becaufe it was not done with a defign to affront him, but in a jocular way, and could be no foundation for the prifoner to turn about in an angry manner and abufe him. The words returned by Mr. *Gower* were not unfuitable to the occafion; though if they had been ever fo improper, it is certain they would have been no provocation in law. And as to their being looked upon otherwife amongft thofe who efteem themfelves your men of honour, give me leave to fay, thofe are miftaken notions of honour, nothing being confiftent with honour that is inconfiftent with the laws of God or man.

The next thing that followed after the words, was the throwing the bottle at Mr. *Gower magna cum vi*, as it is ftated in the verdict. The bottle it is true only touched his perriwig; but fuppofe it had killed him, will any man offer to fay it would not have been murder? What Mr. *Gower* did is not ftated to be fuch an act of violence as the prifoner's, which is found to be done with great force.

It was faid that Mr. *Gower* was the firft that drew his fword, but with what intent appears very plainly: it was not to attack Mr. *Oneby* but to defend himfelf; and therefore when he faw *Oneby*'s fword fecured, he immediately threw away his own. [772]

After this they fit down again, and Mr. *Gower* like a man of temper applies to the other in a very proper manner: it was objected, that he thereby made Mr. *Oneby* to be the aggreffor: if he did fo, he faid no more than the truth, for *Oneby* began firft both by abufive language and by throwing of the bottle. And it is plain that Mr. *Gower* did not defign to upbraid Mr. *Oneby*, but only ufed it as an argument to make up the matter.

The anfwer that is made to this is the ftrongeft evidence of exprefs malice. It can admit of no other conftruction, but that he was determined to take away the other's life.

The calling him back after he was gone out of the room, and telling him *he had fomething to fay to him*, fhews a fedate mind, and a deliberate intention. The words *young man* were words of contempt, and the *fomething he had to fay to him* could be nothing but refentment. He ftaid in the room after all the reft, to have this opportunity of gratifying his revenge, and that *fomething he had to fay to him* is explained by the clafhing of fwords which

was heard immediately upon the other's return, and the ſhutting of the door, when he had that fatal opportunity of carrying his malicious expreſſions into execution.

It is true that he received three ſlight wounds in the engagement. But we think in a caſe of this nature, that an interchange of wounds will not alter the caſe.

Theſe are the reaſons why we are all of opinion, that the killing of Mr. *Gower* was of expreſs malice in the priſoner.

I ſhall now give anſwers to the objections which were made on behalf of the priſoner, and which have been duly weighed and conſidered by the Judges.

It was objected, that this was no more than a ſudden quarrel, where there were provoking words and mutual aſſaults; that it does not appear the paſſions were ever cooled, and that indeed the law has fixed no time wherein it ſhall be preſumed the heat and fury of the party may be allayed, but it is to be left to a jury, and they have found there was no reconciliation.

[773] To this it may be anſwered in the firſt place, that there can be no preſumption in favour of death. *Kelynge* 27. And therefore in all caſes, it lies upon the ſlayer, to extenuate the fact, which *prima facie* is always murder.

In the next place I would obſerve, that it is going much too far, to ſay that this killing was upon a ſudden quarrel; but to take the objection in its full ſtrength, I will ſuppoſe it to be ſo, and then the anſwer I give to it is, that it manifeſtly appears there was a ſufficient time wherein the priſoner might have cooled, and reaſon have reſumed her ſeat, becauſe the ſubſequent acts appear to be deliberate.

In caſes of this nature the Judges are to determine what is malice, or what is a reaſonable time to cool; and they muſt do it upon the circumſtances of the caſe: the jury are judges only of the fact, and we muſt determine whether it be deliberate or not (2). Hence it is, that in ſumming up an evidence the Judges direct the jury, if you believe ſuch a fact, it is ſo; if not, it it otherwiſe; and they find either a general or a ſpecial

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(2) In *Rex* v. *Higgins*, *poſt.* 88). *Rex* v *Dean of St. Aſaph*, 3 *Term Rep.* 428. *n.* (*a*). *Foſt. Introd. to Diſcourſe* 2. *Of Homicide p.* 255.

verdict

verdict upon it. There is no instance where the jury ever find that the fact was done of malice, or that the party had or had not time to cool; but that must be left to the Judges upon the circumstances of the case. In *Holloway*'s case it was left to the court to determine whether the tying the boy to the horse's tail was not a malicious act. So in the case of the two boys who had quarrelled, and the father ran after one of them and killed him, the court, and not the jury, determined whether it was malice or not. *Palm.* 545.

12 Rep. 87. Cro. Jac. 296. 1 H. H. P. C. 453. See Mr. J. *Foster*'s remarks upon this case in his Discourse of Homicide, sect. 2. p. 295.

As the law has fixed no time when the passions shall be said to cool, it must, and only can, be determined upon the circumstances of each particular case. If any deliberate act appears, the question is determined: the quarrelling in a morning, and deferring the fight till afternoon, is a deliberate act, that will make it murder. *Kelynge* 27. And the opinion of the Judges in the Lord *Morley*'s case was, that if diversions intervene, or the parties fall into other discourses, (as they did here for the space of an hour) it will be murder. So in *Bromwich*'s case, 1 *Lev.* 180. the declining an immediate encounter, because of the disadvantage of his high heels, was held to be a deliberate act, that manifested a coolness: and the same has been held, where the parties have debated about the conveniency of place. *Kelynge* 56.

If *A.* says to *B.* I will give you a pot of ale to strike me, and *B.* strikes him, and immediately *A.* kills *B.* it is murder: for *A.* knew what he was about, and deliberated with himself how he might perpetrate the fact, and be at the same time (as he thought) within the protection of the law. *H. P. C.* 48. *Cromp.* 49. [774]

From all which cases it appears, that though the law of *England* is peculiarly favourable in making this distinction with regard to the passions of men, yet it must be such a passion as for the time deprives a man of the exercise of his reason; and wherever it has appeared that he had the exercise of his reason, he is out of the protection of the law, and has been held guilty of murder.

Here was a reasonable time to cool, and it is plain it had its operation: he was cool enough to discourse for an hour, he determined in his own mind upon deliberation what he would do; and he declared his intention in those bitter and deliberate expressions, *No, he would not pass it over, damn him, he would have his blood; the young man must come back, for he had something to say to him.*

The

The interchange of blows, where there is malice, will make no alteration: it does not, indeed, appear who ſtruck firſt upon his returning into the room; but it is ſufficient, that the verdict finds no act inconſiſtent with the malicious declaration of the party; nor can the declaration of the party deceaſed avail in this caſe, for that goes only to his receiving a wound in a fair manner with regard to the nature of the combat.

This is by no means to be reſembled to the caſe of Mr. *Turner*; for there was a provocation, and a blow given with a clog that women wear, and from whence it was not probable that death could enſue: and this appears to be the material ground of the judgment in that caſe, by oppoſing it to *Gray*'s caſe, who was held guilty of murder, becauſe the ſtroke was given with a bar of iron.

The very minute differences obſerved between this and *Mawgridge*'s caſe are no way conſiderable; ſince we are of opinion, that here is expreſs malice, and there it was only implied; not that I would have it imagined, we think this caſe materially different from *Mawgridge*'s; on the contrary, I deſire it may be taken notice of, that we declare otherwiſe, though we adjudge this caſe principally upon the malice expreſſed.

Upon the whole, this court, with the concurrent opinion of all the other Judges, do hold, that the priſoner at the bar is guilty of the murder of *William Gower*.

[775] But in juſtice to the priſoner we muſt give him four days to move in arreſt of judgment, and therefore let him be brought up on this day ſeven-night.

And on *Monday* 19th *June* he was brought up, and objected, that there was no joinder of iſſue for want of a *ſimiliter*: but the precedents in all capital caſes being in this manner, the objection was over-ruled. And Mr. Juſtice *Forteſcue*, in a very ſerious ſpeech, pronounced the ſentence for his execution: which was appointed for *Monday* 3d *July*. Upon the morning whereof he opened a vein, and bled to death, to avoid the infamy of an execution.

Blake *verſ.* Dodemead & ux'.

ERROR *e C. B.* in a *ſcire facias* brought by huſband and wife on a judgment recovered by her, *dum ſola*, and the *ſcire facias* alleges, *quod poſt redditionem judicii prædicti prædicta Sara cepit in virum præd' Johannem Dodemead. Dem' inde, et pro cauſa*, no venue where the plaintiffs were married. And it was inſiſted on error by Serjeant *Hawkins*, that there muſt be a *venue* as to every fact neceſſarily alleged to intitle the plaintiff to recover, and here the marriage is the only foundation for the man's joining in this *ſcire facias*. *Theſ. Br.* 251, 256. *Ow.* 23. 2 *Lev.* 227. *Mo.* 527.

On a *ſcire facias* by *baron* and *feme* upon a judgment recovered by the *feme*, *dum ſola*, the plaintiffs need not allege their marriage with a *venue*. L. Raym. 1504. 1 Barn. B. R. 16. S. C.

Reeve contra. This is only a ſurmiſe, to which no *venue* is neceſſary. If *alien nee* be pleaded in abatement, a *venue* is not neceſſary. *Salk.* 6. This concerns the perſon only, and therefore is triable where the action is brought. Beſides, the precedents are many of them in this manner. *Theſ. Br.* 265. *Off. Br.* 259, 283, 322, 253, 259, 262, 297. 314, 321. *Clift.* 681. In debt upon a bond by huſband and wife it is never alleged.

Ante 9.

At another day *Lee* for the plaintiff in error cited 35 *Hen.* 6. 50. 2 *Leon.* 75. *Co. Ent.* 623. that where it does not come in by ſuppoſal, but is poſitively alleged, there muſt be a *venue*.

He objected likewiſe, that there was a diſcontinuance. The demurrer is *quod narratio minus ſufficiens in lege exiſtit ad actionem manutenend'*, and the joinder is, *quod breve bonum et ſufficiens exiſtit ad execution'*, &c. which is putting in judgment of the court a matter not inſiſted upon by the demurrer. *Salk.* 218.

Upon a *ſcire facias*, if defendant demurs alleging *that the declaration* is inſufficient, a joinder that the writ is ſufficient is no diſcontinuance.

Strange contra, In anſwer to the firſt objection cited more precedents, *Brevia judicialia* 204, 238, 240, 252, 253, 258, 256. where it is alleged, without any *venue*, that the plaintiff was made a knight. *Raſt.* 167. *a.* On a *ſcire facias ad cognoſcendum relaxationem*, no venue where the releaſe made. *Raſt.* 73. *Reg. Jud.* 43.

[776]

As to the ſecond exception, it would have been wrong, if we had followed the defendant's demurrer. There is no ſuch thing as a declaration on a *ſcire facias*, the plea is to the writ, and *narratio* and *breve* in this caſe are the ſame. The caſe in *Salkeld* was a demurrer in bar to a plea in abatement, which was going off from the matter of abatement to the merits of the cauſe; whereas here the ſingle point always in view is, whether the plaintiffs

If the joinder had been otherwiſe it would have been a diſcontinuance.

tiffs shall have execution or not. *Et per curiam*, If the joinder had been otherwise it would have been a discontinuance: the declaration and writ are synonymous, and the demurrer being wrong, the plaintiff could not demur to it; and as to the first objection, there being precedents this way, we think it well enough without a *venue*.

Townsend *vers.* Thorpe.

Parish clerk is a spiritual officer, and may be there deprived. L. Raym. 1507. *Vide Mich.* 6 *Geo.* 2. *Peak* v *Bourne*, this opinion questioned. post. 942 (1).

THE plaintiff declared in prohibition, that he was indicted for an assault with intent to commit Sodomy, notwithstanding which he was proceeded against in the spiritual court for the same offence, and for drunkenness. The defendant pleaded, that the plaintiff was a parish clerk, and that the suit there was not only to punish him for the incontinency, but also to deprive him of his office. *Demurrer inde.* And in *Michaelmas* term last, as it was going to be argued, the court proposed to stay till the indictment was tried: and it having been tried, and the defendant convicted, and pillored; the court, without ordering the declaration to be amended, granted a consultation *quoad* the proceeding to deprive, and confirmed the prohibition as to any other punishment. They said he was an ecclesiastical officer as to every thing but his election. *Salk.* 536. *Mar.* 101. *Salk.* 550.

(1) And over-ruled, *Pitts* v. *Evans*, *post.* 1108. *Tarrant* v. *Haxby*, 1 *Burr.* 367.

Patterson *vers.* Scott.

Debt lies for rent where the deed was made, or land lies. 1 Com. Dig. Action. (N. 4) (N. 6.) 161. (N. 11.) 167.

DEBT for rent on indenture laid to be made at *London*, for the demise of lands in *Surrey*. The action was laid in *London*; and on demurrer, it was held, that the plaintiff had his election to bring it in either, against the lessee; otherwise had it been against an assignee, who is chargeable only on the privity of estate (1). Judgment *pro quer'*.

(1) *Barker* v. *Damer*, 3 *Mod.* 388. S. P. So also if brought by the assignee of the lessor. *Thursby* v. *Plant*, 1 *Sand.* 237. 1 *Lev.* 259. S. C. *Thro'* v. *Cornwall*, 1 *Wils.* 165. But otherwise where he can bring covenant, *ib.*

Thompson *verſ.* Hodgſon.

AN executor libelled in the ſpiritual court for taking a tankard without his conſent, on pretence that the teſtator gave it the defendant if he died of his then ſickneſs. And the court granted a prohibition, this not being a legacy, but a *donatio cauſa mortis*, the validity whereof may be tried in an action of trover.

Donatio cauſa mortis not ſuable in ſpiritual court. *Vide* 1 *P. Wms.* 441. Sel. Caſ. in Chan. 14.

Duke of Rutland *verſ.* Batty.

AN action was brought on a *South-ſea* contract in theſe words: "I promiſe to pay to the Duke of *Rutland* "10,000 *l.* upon his transferring to me or my order 1000 *l.* capital *South-ſea* ſtock ſome time on or before the ſhutting of the "company's books for the next *Chriſtmas* dividend."

The tender of ſtock muſt be at the laſt part of the day that it can be accepted.

The tender and transfer were made at one: but it being the day of ſhutting the books, there was more buſineſs than could be tranſacted in the morning, and therefore the books were opened in the afternoon, and ſeveral transfers were made. Upon the trial of this cauſe the jury found for the plaintiff. But a new trial was granted, becauſe after the transfer was vacated at one, the defendant might have come and accepted the ſtock: and though the general rule of law, that tenders muſt be at the laſt inſtant of time, has been broke in upon, and made to relate to the laſt part of the day whereon in theſe caſes the act can be done; yet that is only out of neceſſity, of which there was none in this caſe (1).

Mich. 2. *Geo* 2. it was tried at the bar, and the court being of the ſame opinion, the plaintiff ſuffered a nonſuit (*a*).

(*a*) 1 Barnard. B. R. 95.

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(1) *Lancaſhire* v. *Killingworth*, 1 *Ld. Raym.* 686. *et vide ante* 504, 533, 458, 579, 832.

Woadſon *verſ.* Nawton.

TRESPASS for taking and diſperſing a load of fern aſhes: the defendant pleaded, that he was an occupier of land in *A.* the tenants whereof had right of common and cutting fern on the *locus in quo*; and that the plaintiff wrongfully came and cut fern and burnt it whereupon the defendant came and ſcattered it about, *prout ei bene licuit. Demurrer inde*; and

Commoner cannot juſtify diſperſing fern aſhes burnt by a ſtranger.

Strange

Strange pro def' cited 1 *Roll. Abr.* 405. *pl.* 5. that a commoner may justify taking the cattle of a stranger damage feasant, or abate hedges. 9 *Co.* 112. *b.* 2 *Mod.* 65. And the difference is, where it is the act of the lord, and the act of a stranger. *Lutw.* 1240. *Sti.* 428.

Sed tota curia contra. For if the plaintiff did him any damage, he has his action; but after the plaintiff had burnt the fern, and thereby converted it to his own use; the commoner has no right to come and disperse it. *Judicium pro quer'.*

Warren *verf.* Confett.

Intr. Hil. 8 Geo. rot. 47.

Debt on a specialty for not accepting and paying for stock. *Nil debet* is no plea. L. Raym. 1500. 1 Barnard. B.R. 15. 8 Mod. 106, 323, 382. S. C.

DEBT on a specialty for the penalty, for not accepting and paying for stock according to a contract. And the plaintiff avers performance of every thing on his part to intitle him to the action: the defendant pleads *nil debet*, to which the plaintiff *demurs*, and judgment is given in *C. B. pro quer'*, and error brought in *B. R.*

Wearg, In maintenance of the judgment said, it had been often determined, that *nil debet* is not pleadable, where the action is founded upon the specialty: and the reason is, because the defendant may either rely upon it, that it is his deed, and he has performed it; or it is not his deed, and he is not bound to perform it: whereas *nil debet* (if it should be allowed) will give him the opportunity of meeting the plaintiff both ways.

Raby contra. Where the plaintiff, in order to maintain his action, must necessarily aver a matter *in pais*, (as in this case he must a readiness on his part) *nil debet* is pleadable. *Salk.* 284, 565. 10 *H.* 7. 24. 6 *Mod.* 127.

Eyre J. thought the plea might be maintained on that distinction, *sed cæteri contra. Adjournatur.* And

Mich. 9 *Geo.* Serjeant *Whitaker pro quer' in errore* argued, that *nil debet* is pleadable in this case; because the plaintiff must aver several matters of fact, to intitle him to the action, in relation to his own readiness, and the defendant's default. 5 *Co.* 43. 21 *H.* 7. 14. *Keilw.* 153. *b.* In account before auditors *nil debet* may be pleaded. 49 *E.* 3. 8 *H.* 6. 5. *b.* So where the assignee of commissioners of bankruptcy brings an action, he sets out several matters of fact, which he must prove upon *nil debet*.

Wearg

Wearg contra. This action is for the penalty, and the reason why *nil debet* is not allowed is, because the action is founded on so solemn a thing as the deed of the party; and the court will not suffer a man to plead other matter, till he has admitted it to be his deed; and the party has his election, either to confess and avoid or deny, whereas this issue involves them all. The case of a penal statute is not founded on the deed of the party: and that of an arbitrement, or an account, may have no writing in it. *Curia advisare vult.* And afterwards in *Michaelmas* term 11 *Geo.* Sir *Robert Raymond* coming into court before judgment was given; it was argued a third time by Mr. *Reeve* and Serjeant *Darnall.*

Reeve pro querente in errore. The plaintiff below hath specially assigned it for cause of demurrer, that the general issue is not pleadable in this case. It must be admitted, that the plaintiff could not maintain debt, without shewing the articles, and a breach, to intitle him to the penalty: and that differs it from the case of a bond with a condition, where the condition being for the benefit of the defendant, he must shew a performance of it, and shall not plead *nil debet.* Here matter *en fait,* and in fact, are mixed; and it does not come within the reason of an obligation, where *prima facie* the defendant is estopped to say there is no debt; upon which difference all the cases have gone. 21 *H.* 7. 14. *Bro. Issue join.* 23. 2 *Keb.* 347. 11 *H.* 7. 4. *b.* 45 *E.* 3. 4. *b.* 46 *E.* 3. 1. *b.* 1 *Saund.* 38. *Cro. Car.* 513. *Hutt.* 109. *Hob.* 244. 3 *Lev.* 170. In the case of *Barras* v. *Andrews, Mich.* 2 *Ann. Holt* C. J. held, that in debt against an administrator, suggesting a *devastavit, nil debet* was pleadable, and there matter in fact and matter of record are both joined.

Serjeant *Darnall contra.* I agree, where the action is founded on matter intirely *dehors* the deed, *nil debet* is pleadable; such are escapes, *levy per distress,* entry and expulsion, which are the *gist* of the action, and the judgment or deed is only used as an inducement: and so it is in actions for a penalty given by act of Parliament But this action is grounded intirely upon the deed, which is *quasi* a bond, and all the rest is in the nature of a condition. The breach here is assigned upon the deed. 2 *Saund.* 344. *Hardr.* 332. *Salk.* 565. *Keilw.* 47.

If this plea be allowed, it will make it very difficult and expensive for a plaintiff to recover. He must look every way, and consider from how many quarters he is liable to be attacked. He must be prepared to prove the execution of the deed, the registry of the contract, the opening the books, a tender and refusal, before he can so much as put it upon the defendant to answer

ſwer him; and if he happens to get through all this, the defendant may ſurprize him, by giving in evidence *non compos*, dureſs, releaſe, or many things of that nature: or if a plaintiff ſhould be prepared to meet him in all thoſe inſtances, yet it muſt be a pretty large debt that can make it worth his while to be at all that expence. Theſe inconveniencies may be all avoided, by diſallowing this plea; and no inconvenience can follow to the defendant, ſince the act for the amendment of the law has given a liberty to plead ſeveral matters.

(a) Smith v. Whitbread, cited 2 L. Raym. 1503.

Curia adviſare vult. And this term it was argued a fourth time by Mr. *Fazakerley* and Serjeant *Chapple*, who inſiſted on the common caſe of a bail bond (a) where it is not allowed to plead *nil debet*: which the court thought a caſe in point, and ſaid that as this is a plea vaſtly moſt advantageous for a defendant, it would have been often attempted; but that it was a general notion, it would not be allowed. The judgment of *C. B.* affirmed (1).

(1) *Hart* v. *Weſton*, 5 *Burr.* 2586. 2 *Black.* 683. S. C. *dec. acc.*

Michaelmas Term

1 Georgii 2. Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*
Sir Francis Page, *Knt.*
James Reynolds Esq. } *Justices.*
Sir Edmund Probyn, *Knt.*
Sir Philip Yorke, *Knt. Attorney General.*
Charles Talbot, *Esq; Solicitor General.*

Hunter *verf.* Sampfon et al' manucapt. Yardley.

PARKER moved to ftay proceedings againft the bail, pending error by the principal, upon the terms it was done upon in *Myer* v. *Arthur, ante* 419. But it appearing here, that bail was not put in upon the writ of error, fo as to make it an abfolute *fuperfedeas*; the court refufed it, faying they would not go one ftep farther than the cafe of *Myer* v. *Arthur.*

Will not ftay proceedings againft bail pending error till bail is put in upon the writ of error.

Holiday *verf.* Fletcher.

THE declaration ran thus: *A. H. queritur de P. F. adminiftratore omnium et fingulorum bonorum jurium et creditorum quæ fuerunt B. F. nuper viri fui defuncti qui obiit inteftat', &c.* To which the defendant demurred, and fhewed for caufe, that there was no averment that adminiftration was committed to the defendant, it being common towards the end of the declaration to fay, *cui quidem P. F. adminiftratio, &c. commiffa fuit.* And Mr. *Wynne pro def'* cited *Cro. Jac.* 10. 1 *Sid.* 228. 2 *Vent.* 84.

In *B. R.* calling the defendant adminiftrator in the declaration is fufficient, without a fpecialty averment. L. Raym. 1510. 1 Barn. B. R. 29. S. C.

Litt. Rep. 80, Sir *T. Jones* 1. *Bro. Adm.* 11. *Rast.* 320. *Sed per curiam*, There is a material difference between declarations in this court, and in *C. B.* where the beginning of the declaration is only a recital of the writ, *A. B. summonitus fuit ad respondendum C. D.* whereas in *B. R.* it is *A. B. queritur de C. D.* Here it is sufficiently alleged, so as to be traversed; and the word *existente* must be understood. 9 *H.* 5, 6, 7. *Plow.* 192. 2 *Saund.* 61. *Judicium pro quer'.*

Studley *verf.* Sturt.

Sunday not to be computed one of the four days for bail.
1 Barnard. B. R. 21. S. C.

THE writ was returnable on *Wednesday*, and the bail bond was assigned on the *Monday* following; and the court held the plaintiff was too soon by a day, for that *Sunday* was not to be reckoned, *ante* 86, *post.* 914.

Chambers *verf.* Robinson.

There cannot be special bail in a second action on a second judgment. And after defendant has two terms without being charged, he shall be discharged as to the first.

THE defendant after judgment surrendered himself in discharge of his bail, and lay two terms without being charged in execution: during which time the plaintiff brought an action of debt upon the judgment, and after a recovery in that action, the defendant lay two terms more, without being charged: and the plaintiff brought another action of debt upon the second judgment, whereupon the defendant moved for a *supersedeas* as to the two first actions, and that common bail might be accepted in the last. And upon consideration both were granted: it was agreed, that in the first action of debt on judgment special bail might be required (1), but the court said it would be a handle of oppression if they carried it any farther.

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(1) *Wright* v. *Kerswill*, *Barnes* 1039. *De La Cour* v. *Read*, 2 *H'* 376. *Vide Hall* v. *Howes*, *post.* *Black.* 278.

Dominus Rex *verf.* Powell.

What does not abate by death of the King.
8 Mod. 165.
3 Bro. Par. Ca. 428. S. C. but not S. P.

IT was held that proceedings on an information in nature of a *quo warranto* are not abated by the demise of the crown.

Wilson *verf.* Wilkinson.

Custom in paying tithe of wool by the pound and not by the fleece is no *modus*.

LIBEL in the spiritual court for tithe of wool: the defendant pleaded, that by ancient usage in the parish the tithe of wool was paid by the pound, and not by the fleece: and thereupon

upon moved for a prohibition, as being a *modus*. But the court held this was not a *modus*, only a different manner of computing the *quantum*, wherein it is agreed that the tenth part is to be paid in all events. The prohibition was denied.

Earl of Aylesford's Cafe. In Canc.

THERE was a *parol* agreement for a leafe of twenty-one years, upon which the leffee entered, and enjoyed for fix years, and then the Earl brought a bill againft him to oblige him to execute a counterpart for the refidue of the term. The leffee pleaded the ftatute of frauds and perjuries, which on argument was over-ruled, the agreement being in part carried into execution (1).

Statute of frauds not pleadable where the agreement is executed in part.

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(1) That equity will enforce the performance of a parol agreement *carried partly into execution*, notwithftanding the ftatute of frauds. *Vide Hollis* v. *Whiteing*, 1 *Vern*. 151. *Hollis* v. *Edwards*, *ib*. 159. *Butcher* v. *Stapely*, *ib*. 363. *Pyke* v. *Williams*, 2 *Vern*. 455. *Foxcraft* v. *Lifter*, *ib*. 456. *Gilb. Eq. Rep*. 4 11. S. C. *Lamas* v. *Bayley*, 2 *Vern*. 627. *Savage* v. *Fofter*, 9 *Mod*. 37. *Lord Pengal* v. *Rofs*, 2 *Eq. Caf. Abr*. 46. *pl*. 12. *Anon* 4 *Geo*. 1. *Vin*. *Abr*. *Tit*. *Contract*. (H.) *Ca*. 38. *anon*. *id*. *ib*. *Ca*. 40. *Lockey* v. *Lockey*, *Prec. in Chanc*. 519. *Seagood* v. *Meale*, *ib*. 561. *ante* 426. *Clerk* v. *Wright*, 1 *Atk* 12. *Lacon* v. *Mertins*, 3 *Atk*. 4. *Gunter* v. *Halfey*, *Amb*. 586. *Whaley* v. *Baginall*, 6 *Bro*. *Par*. *Ca*. 45. *Whitbread* v. *Brockhurft*, 1 *Bro. Chan. Caf*. 404. It is faid in *Smith* v. *Turner*, 2 *Eq. Ca. Abr*. 49. *pl*. 23. and *Seagood* v. *Meale*, *Prec. in Chanc*. 564. That if the leffee had been put to no expence, a promife of a leafe, *though accompanied with poffeffion*, would not be fufficient to oblige the leffor to execute a leafe. But in many of the cafes above cited, it feems to have been held otherwife.

Dacofta *and* the Ruffia Company.

UPON a *mandamus* to admit him into the company, a fide bar rule was obtained to return the writ; and upon motion in court that rule was fet afide, becaufe there ought to have been an affidavit of fervice of the writ: then a new rule was moved for, and oppofed, becaufe this not being a cafe within the *mandamus* act (*a*) the plaintiff ought to go the old way by *alias* and *pluries*. But the court held that not neceffary, and made a rule on the company to return the writ in four days. *Strange pro focietate*.

Practice on *mandamus*'s. Fitzg. 4. 1 Barnard. B. R. 24. S. C.

(*a*) 9 Ann. cap. 20.

I 2

Frescobaldi *vers.* Kinaston.

Where two join in a writ of error, and one will not assign errors, the court will give the other time to summon and sever.
Fitzg. 1.
1 Barnard. B. R. 4, 23. S. C.

A Writ of error was brought by two executors, of a judgment against them, *ad grave damnum* of both. A *scire facias* was taken out, and a *scire feci* returned. And then one of the plaintiffs in error moved for time to assign errors, till there could be a summons and severance of the other; upon an affidavit that the other executor was in the interest of the defendant in error, and would not join. And time was given accordingly. And afterwards upon argument the case appeared to be thus:

[784]
Where there are two executors and one under age, they may sue, but cannot be sued by attorney. But one may appear by attorney and the other by guardian.

Error of a judgment in *C. B.* in case upon several promises against two executors on a promise by their testator. They plead *quod ipsi non assumpserunt.* To which the plaintiff demurs, and for want of a joinder there is judgment by default, upon which a writ of inquiry issues, and damages are assessed with costs. Then there is a judgment for the damages *de bonis testatoris*; and as to the costs, *de bonis propriis*, they are remitted. Upon error in *B. R.* one executor only appears, and prays summons and severance of the other, upon which there is a judgment *quod sequatur solus*; and then he assigns for error, that he was an infant, and has appeared by attorney; and *in nullo est erratum* is pleaded.

Mich. 13 *Geo.* 1. *Reeve pro quer' in errore* argued, that *in nullo est erratum* had admitted the infancy, and therefore it was to be taken up as a point of law. I agree, if executors were plaintiffs, he of full age might make an attorney for both; but the distinction has always been, that where they are defendants, he cannot: for there if he mispleads, there are costs *de bonis propriis*, for which he must have an action against his guardian, which he cannot have against an attorney. Whereas when he is plaintiff, he pays no costs. 2 *Cro.* 420, 441. 1 *Roll. Abr.* 287.

Executors are considered as distinct persons, and therefore may sever in their pleas. 1 *Roll. Abr.* 229. And so it was done in the case of *Baldwin* v. *Church*, *Hil.* 2 *Geo. in B. R.* (*a*). The being joined with another of full age signifies nothing, for this is a personal privilege. 2 *Saund.* 212. 1 *Lev.* 299. *Sti.* 318.

(*a*) Ante 20. 10 Mod. 323.

Strange contra. In reason there is no difference between being plaintiffs or defendants. As he pays costs if a defendant, he is amerced *pro falso clamore* if a plaintiff. If a plaintiff, he may be barred of his demand, as well as have a final judgment against him

him where he is defendant. Where there are two executors, they make but one reprefentative of the teftator, and the fuit is in *auter droit*. *Cro. El.* 541. An infant fole executor fued by attorney, and held well, and the judgment affirmed. *Show.* 169. Two avow as bailiffs, and one being of age, it was held, that he might make an attorney for both; and *Holt* C. J. faid it would be the fame with the cafe of two executors, where one might make an attorney for both, as well as difpofe of the whole eftate. There is a neceffity (fays he) for all to join, and therefore one attorney fhall ferve for all.

But whatever might be the law in other cafes, where the infant defendant is charged with cofts; yet he can fuffer no damage here, becaufe the cofts are remitted. 1 *Roll. Abr.* 784. *pl.* 5, 6. 1 *Co.* 162. 8 *Co.* 35.

Reeve replied. The cafe in *Cro. El.* 541. is denied in *Cro.* 420. [785] And as to the cafe in *Shower*, it is within my admittance, for avowants are in the nature of plaintiffs.

C. J. This cafe requires great confideration. No cafe has been cited to make this good, where the infant is defendant. But the cafe in *Stiles* is in point to make it bad. Where they are plaintiffs, it is not to be doubted but all might appear by attorney. One executor it is true may make an abfolute difpofition of any part of the eftate, but then it will be a *devaftavit* in him only; whereas if they are defendants and do not make a good defence, it is a *devaftavit* in all. Here it appears, a good defence was not made, for the attorney has pleaded a plea which could never bring the merits in queftion; and this being an action on fimple contract, he may be prejudiced by not pleading debts upon fpecialty.

1 Com. Dig. Tit. Adminiftration. (I. 1.) (I. 2) (I. 3.)

Fortefcue J. I think this cafe ftands upon a different foot from the cafe of an infant fole executor. For if one executor can difpofe of the eftate in fpite of the other, why may not he do an act of a lefs nature in appointing an attorney for both, which is only giving a bare authority. Executors are but one perfon in the eye of the law; and it is abfurd to fay, the executor is of full age, and under age, at the fame time. There is no reafon given for the opinion in *Stiles*, and the cafes in *Shower* and 2 *Saund.* are fince: and if there be no real difference between being plaintiffs and defendants, (as I think there is not) then the later authorities are againft the cafe in *Stiles*. If an infant executor brings trover upon a converfion in his own time, he pays cofts, according to the cafe of *Baller* v. *Delander* (*a*); and I do not fee why he may not be as liable to be hurt by a declaration or replication as well as a plea.

(*a*) Caf. Temp. Hard. 205.

Reynolds

Reynolds J. It will be pretty difficult to adjuſt the reſolutions which have been cited on both ſides, with the general reaſon of the law; where the general rule is, that no infant can appear by attorney (1). And that proviſion for his ſecurity will ſignify nothing, if another may make an attorney for him. If he was a ſole executor defendant, it ſeems to be agreed that he could not appear by attorney; and the only point this is attempted to be ſupported upon is, that being joined with one of full age alters the caſe. Now if they were obliged to appear as one perſon, I ſhould think it might be well; but it is certain they are not obliged to do ſo, for as they may ſever in pleading, ſo one may appear by attorney, and the other by guardian; which ſhews that to many purpoſes they are not one perſon in the eye of the law. But I muſt own I cannot ſee the ſubſtantial difference between their being plaintiffs and defendants. And ſince it is admitted

[786] to be well in the caſe of plaintiffs, it goes a great way with me as to the other point.

Probyn Juſtice, the law has always been jealous of putting an infant under the power of one who is not anſwerable to him, as a guardian is. There is this difference between their being plaintiffs and defendants; that as plaintiffs they cannot ſever in declaring, which they may do in pleading as defendants.

After this argument it ſtood upon a *curia adviſare vult*, till this term, when Sir *Francis Page* being come into Juſtice *Forteſcue's* place, it was argued again upon his account; and upon the argument he and the Chief Juſtice were clearly of opinion, that the judgment was erroneous: and *Reynolds* Juſtice ſaid, he had conſidered it more fully, and was of opinion he could not appear by attorney, though another was joined who could: and *Probyn* Juſtice concurring, the judgment of *C. B.* was reverſed.

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(1) *Power* v. *Jones, ante* 445.

Dominus Rex *verſ.* Elliot.

B. R. cannot receive a fine ſet by inferior court (1). 1 Seſſ. Ca. p. 325. no. 262. S. C. but a different point.

THE juſtices of a borough committed the defendant for non-payment of a fine ſet on him for a contempt in court. The defendant brought a *habeas corpus*, and the court held it a good commitment; upon which he offered to pay the fine in *B. R.* but they ſaid they could not take it; he muſt be remanded, and pay it below.

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(1) Neither can it ſet one where the juſtices have neglected *Rex* v. *Elwell, poſt* 796.

Smith *verſ.* Fuller.

ERROR of a judgment in *C. B.* in caſe for ſcandalous words, of which four ſeveral ſetts were laid in the declaration. Upon Not guilty, the jury find for the plaintiff as to one ſet of words, and for the defendant as to all the reſt; and there is a judgment for the plaintiff as to the damages and coſts of ſuit.

Where the defendant is found Not guilty as to part, there muſt be a judgment for him as to that But though error is brought, the record may be amended by the verdict.

On error in *B. R.* it was objected by *Strange*, that there ought to be a judgment for the defendant as to the words of which he is acquitted, that he may plead the acquittal in bar of any other action. 1 *Roll. Abr.* 771. *pl.* 18, 20. 772. *pl.* 26. 1 *Roll. Rep.* 293. 1 *Keb.* 488. 2 *Saund.* 250. 1 *Saund.* 281. 8 *Co.* 58. *Co. Ent.* 287, 304, 537, 676. and the plaintiff ſhould be amerced *pro falſo clamore* as to ſo much. In the caſe of *Tench* v. *Dalton*, *Paſch.* 3 *Geo.* 1. in ejectment there was (*inter alia*) a verdict for *Mountain*, and a releaſe of that, and it was long debated, whether it was neceſſary to have judgment in that caſe for the defendant; but it was taken for granted that there muſt have been one, if there had been a verdict for him.

Cited And. 386. S. C. 1 Com. Dig. Amendment. (R.) 473.

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The court thought the judgment was not to be ſupported, but put it off on the importunity of the defendant in error, who then applied to *C. B.* and moved to amend the record by the verdict: and after a rule to ſhew cauſe, the record was amended, and a judgment added, that *quoad* the words of which the defendant was acquitted *eat indeſine die*, and the plaintiff *in miſericordia*, &c. And then the King's Bench was moved to amend the record there, and afterwards the judgment was affirmed.

The Caſe of John Bennet, Eſquire, one of the Maſters of the High Court of Chancery.

HE was a ground landlord of a houſe, in which an underleſſee dwelt, againſt whom execution was ſued out. The court was moved for a rule on the ſheriff to pay Mr. *Bennet* a year's rent, purſuant to 8 *Ann. c.* 14. But it was held, that this was not a caſe within the ſtatute, which extends only to the immediate landlord; and the caſe of *Carr* v. *Goldington* was mentioned to have been ſo adjudged.

Ground landlord cannot come in for rent on execution againſt an under-leſſee. 8 Ann. c. 14.

White *verſ.* Woodhouſe.

n what action cannot bring money into court (1).
1 Barnard. B. R. 25. S. C.

IN a ſpecial action upon the caſe for immoderately driving a chaiſe let to hire; the court refuſed to let the defendant bring money into court, and diſcharged a rule which had been obtained as of courſe for that purpoſe: and the Chief Juſtice ſaid, the firſt motion to bring money into court was in *Keylinge's* time, and introduced to avoid the hazard and difficulty of pleading a tender. *Strange pro quer'.*

(1) *Vide Hallet* v. *Eaſt India Company*, 2 *Burr.* 1120. as to the principle by which permitting the payment of money into court is regulated.

Turvil *verſ.* Aynſworth.

Any variation in the name of a corporation is fatal.
7 G. 1. ſt. 2. c. 1.
L. Raym. 1515. S. C. with two other exceptions.

IN an action upon a *South-ſea* contract, the plaintiff declared it was for ſtock in the company trading *ad maria Auſtrial' vocat'* the *South-ſea* company. It was inſiſted on at the trial, that *Auſtralis* was the proper word, without an *i*, and therefore the evidence did not ſupport the declaration: and it was agreed to take a verdict for the plaintiff, and to apply to the court: and after a great debate a new trial was granted; for it was a different corporation, and if the word *Auſtrial'* was to be rejected, it

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would not do, for then it would be a company trading to all ſeas, whereas they trade in the *South Seas* only; and the *Anglice vocat'* the *South-ſea* company, will not do, where there is a proper *Latin* word which is not made uſe of (1). *James Oſborn's* caſe, 10 *Co.* 130.

The plaintiff afterwards had leave to amend his declaration upon payment of coſts.

(1) Mr. *Douglas* in a note in his valuable reports to *Rex* v. *May*, n. 194. n. 253. makes a *quære* of the authority of this caſe, *et vide Williams* v. *Ogle*, *poſt.* 889.

Dominus Rex *verſ.* Liſter.

Indictment on 5 *Eliz.* quaſhed.
2 Seſſ. Ca. p. 227. no. 160.
10 Mod. 85.
1 Barnard. B. R. 30. S. C.

IN an indictment for exerciſing the trade of a *Salter* (which was held well, though not mentioned in the ſtatute 5 *Eliz.* *c.* 4. 1 *Lev.* 243. 1 *Sid.* 367. 2 *Keb.* 582.) the ſtile of the King

King was *Magnæ Britanniæ*; and the trade laid to be exercifed at the time of the ftatute *infra hœc regnum* muft refer to *Magnæ Britanniæ*, whereas by the words of the ftatute it muft be ufed in *England*; and for this fault the indictment was quafhed. And fo was a former indictment, *Rex* v. *Parifh*, *Trin.* 13 *Geo.* 1. (1).

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(1) *Rex* v. *Hotch*, S. P. *ante* 552.

Dominus Rex *verf.* Street.

Order to provide for baftard till nine, if it fhould fo long live, good. Cafes of Sett. & Rem. p. 124. no. 171. Shaw. P. L. 65. 1 Seff. Ca. p. 296. no. 233. 1 Barnard. B. R. 31. S. C.

AN order of baftardy was made, to pay fo much weekly, till the child was nine years old, if it fhould fo long live. *Et per cur'*, It is a good order, for we cannot intend it able to provide for itfelf fooner (1).

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(1) *Smith's* cafe, 1 *Bott by Conft.* 434. *pl.* 584.

Dominus Rex *verf.* Curl.

An obfcene book is punifhable as a libel. 1 Barnard. B. R. 29. 10 S. T. ap. 92. Fort. 100.

INFORMATION exhibited by the attorney general againft the defendant *Edmond Curl*, for that he *exiftens homo iniquus et fceleratus ac nequiter machinans et intendens bonos mores fubditorum hujus regni corrumpere, et eos ad nequitiam inducere, quendam turpem iniquum et obfcænum libellum intitulat' Venus in the cloifter, or the Nun in her fmock, impio et nequiter impreffit et publicavit, ac imprimi et publicari caufavit*, (fetting out the feveral lewd paffages,) *in malum exemplum &c.* And of this the defendant was found guilty. And in *Trinity* term laft it was moved in arreft of judgment by Mr. *Marfh*, that however the defendant may be punifhable for this in the fpiritual court as an offence *contra bonos mores*, yet it can't be a libel for which he is punifhable in the temporal court. *Libellus* is a diminutive of the word *Liber*, and 'tis *libellus* from it's being a book, and not from the matter of it's contents. In the cafe *de libellis famofis* my Lord *Coke* fays, that it muft be againft the publick, or fome private perfon, to be a libel; and I don't remember ever to have heard this opinion contradicted. [789] Whatever tends to corrupt the morals of the people, ought to be cenfured in the fpiritual court, to which properly all fuch caufes belong: what their proceedings are I am a ftranger to; but for me 'tis fufficient to fay, I don't find any cafe wherein they were ever prohibited in fuch a caufe: in the reign of King *Charles* the Second there was a filthy run of obfcene writings, for which we meet with no profecution in the temporal courts;

courts; and fince thefe were things not fit to go unpunifhed, it is to be fuppofed that my Lords the Bifhops animadverted upon them in their courts. In the cafe of *The Queen* v. *Read* (*a*), 6 *Ann. in B. R.* there was an information for a libel in writing an obfcene book called *The fifteen Pleagues of a Maidenhead*, and after conviction it was moved in arreft of judment, that this was not punifhable in the temporal courts; and the opinion of Chief Juftice *Holt* was fo ftrong with the objection, that the profecutor never thought fit to ftir it again.

(*a*) Fort. 98.

Mr. Attorney General *contra*, I do not obferve it is pretended there is any other way of punifhing the defendant; for if the fpiritual court had done it, inftances might be given; and it is no argument to fay we meet with no prohibitions; fuch a way of arguing would conftrue them into all forts of jurifdictions.

What I infift upon is, that this is an offence at common law, as it tends to corrupt the morals of the King's fubjects, and is againft the *peace* of the King. *Peace* includes good order and government, and that peace may be broken in many inftances without an actual force. 1. If it be an act againft the conftitution or civil government; 2. If it be againft religion: and, 3. If againft morality.

1. Under the firft head fall all the cafes of feditious words or writings. 2 *Roll. Abr.* 78. *pl.* 2. 1 *Vent.* 324. 3 *Keb.* 841. and the cafe of *The Queen* v. *Bedford*, *Mich.* 12 *Ann.* whofe treatife of hereditary right was held to be a libel, though it contained no reflection upon any part of the then government.

11 S. T. 121. Gilb. Rep. in B. R. 297. but S. P.

2. It is a libel if it reflects upon religion, that great bafis of civil government and fociety; and it may be both a fpiritual and temporal offence. *Cro. Jac.* 421. 2 *Roll. Abr.* 78. *pl.* 2. 1 *Vent.* 293. 3 *Keb.* 607, 621. In *Tremayne's Entries* 226. there is a fentence to have a paper fixed over the defendant's head, intimating that he had uttered blafphemous words tending to the fubverfion of government. There is one *Hall* now in cuftody on a conviction as for a libel intitled *A Sober Reply to the Merry Arguments about the Trinity*, and *Pafch.* 10 *Ann. Regina* v. *Clendon*, there was a fpecial verdict on a libel about the Trinity, and it was not made a doubt of in that cafe.

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1 Str. 416. poft. 834.

3. As to morality. Deftroying that is deftroying the peace of the government, for government is no more than publick order, which is morality. My Lord Chief Juftice *Hale* ufed to fay, Chriftianity is part of the law, and why not Morality too? I do not infift that every immoral act is indictable, fuch as telling a lie,

ſie, or the like; but if it is deſtructive of morality in general, if it does, or may, affect all the King's ſubjects, it then is an offence of a publick nature. And upon this diſtinction it is, that particular acts of fornication are not puniſhable in the temporal courts, and bawdy-houſes are. In Sir *Charles Sedley*'s caſe it was ſaid, that this court is the *Cuſtos morum* of the King's ſubjects. 1 *Sid.* 168. And upon this foundation there have been many proſecutions againſt the players for obſcene plays, though they have had intereſt enough to get the proceedings ſtayed before judgment. *Tremayne's Ent.* 209, 213, 214, 215. 3 vol. *State Trials*, *Lord Grey's caſe.*

Mich. 10 *W.* 3. *Rex* v. *Hill*, the defendant was indicted for printing ſome obſcene poems of my Lord *Rocheſter*'s, tending to the corruption of youth; upon which he went abroad, and was outlawed; which he would not have done if his counſel had thought it no libel.

The ſpiritual courts puniſh only perſonal ſpiritual defamation by words; if it is reduced to writing, it is a temporal offence. *Salk.* 552. *Mo.* 627. and it is puniſhable as a libel. My Lord *Coke* in the caſe *de libellis famoſis* had nothing in view but ſcandalous defamatory libels. *Libellus* is not always to be taken as a technical word; in this caſe it may ſtand as an obſcene little book. And as to the caſe of *Read*, there was no judgment, but it went off upon the Chief Juſtice's ſaying, Why don't you go to the ſpiritual court; which was giving a falſe reaſon for that ſudden opinion, now it appears there is no inſtance of the ſpiritual court's intermeddling, where it is reduced to writing or in print.

Chief Juſtice, I think this is a caſe of very great conſequence, though if it was not for the caſe of *The Queen* v. *Read*, I ſhould make no great difficulty of it. Certainly the ſpiritual court has nothing to do with it, if in writing: and if it reflects on religion, virtue, or morality, if it tends to diſturb the civil order of ſociety, I think it is a temporal offence. I do not think *libellus* is always to be taken as a technical word. Would not trover lie *de quodam libello intitulat'* the New Teſtament, and does not the ſpiritual court proceed upon a libel?

Forteſcue J. I own this is a great offence, but I know of no law by which we can puniſh it. Common law is common uſage, and where there is no law there can be no tranſgreſſion. At common law drunkenneſs, or curſing and ſwearing, were not puniſhable; and yet I do not find the ſpiritual court took notice of them. This is but a general ſolicitation of chaſtity, and not indictable. [791]

indictable. Lady *Purbeck*'s caſe was for procuring men and women to meet at her houſe, and held not indictable, unleſs there had been particular facts to make it a bawdy-houſe. To make it indictable there ſhould be a breach of the peace, or ſomething tending to it, of which there is nothing in this caſe. A libel is a technical word at common law, and I muſt own the caſe of the *Queen* v. *Read* ſticks with me, for there was a rule to arreſt the judgment *niſi*. And in Sir *Charles Sedley*'s caſe there was a force in throwing out bottles upon the people's heads.

Reynolds J. It is much to be lamented if this is not puniſhable: I agree there may be many inſtances, where acts of immorality are of ſpiritual cognizance only; but then thoſe are particular acts, where the proſecution is *pro ſalute animæ* of the offender, and not where they are of a general immoral tendency: which I take to be a reaſonable diſtinction. *Read*'s caſe is indeed a caſe in point. But I confeſs I ſhould not have been of that opinion. *Libellus* does not *ex vi termini* import defamation, but is to be governed by the epithet which is added to it. This is ſurely worſe than Sir *Charles Sedley*'s caſe, who only expoſed himſelf to the people then preſent, who might chooſe whether they would look upon him or not; whereas this book goes all over the kingdom. Drunkenneſs and ſwearing were puniſhable in the ſpiritual court before the acts which made them temporal offences, and in which the juriſdiction of the ſpiritual court is ſaved.

Probyn J. inclined this to be puniſhable at common law, as an offence againſt the peace, in tending to weaken the bonds of civil ſociety, virtue, and morality. But it being a caſe of great conſequence, it was ordered to ſtand over for a further argument.

And this term *Page* J. being come into the King's Bench in the room of Juſtice *Forteſcue*, it was to have been ſpoke to by Mr. Solicitor General and myſelf. But *Curl* not having attended me in time, I acquainted the court I was not prepared: and my want of being ready proceeding from his own neglect, they re-
[792] fuſed to indulge him to the next term. And in two or three days, they gave it as their unanimous opinion, that this was a temporal offence. They ſaid it was plain the force uſed in *Sedley*'s caſe was but a ſmall ingredient in the judgment of the court, who fined him 2000*l*. And if the force was all they went upon, there was no occaſion to talk of the court's being *cenſor morum* of the King's ſubjects. They ſaid if *Read*'s caſe was to be adjudged, they ſhould rule it otherwiſe: and therefore in this caſe

case they gave judgment for the King. And the defendant was afterwards set in the pillory, as he well deserved (1).

(1) An information was granted against Mr. *Wilkes* for a similar offence, and this objection was not taken. 4 *Burr.* 2527.

Gee *verf.* Brown.

At Guildhall coram Eyre *C. J.* de C. B.

Within what time a bill must be received.

IN an action upon an inland bill of exchange brought by the indorsee against the drawer, it appeared the bill was payable 14 *May*; that upon a promise of payment the indorsee gave him to the 18th, from thence to 20th, thence to 24th, and from thence to 7th of *June*, when the acceptor failed. And there being no notice to the drawer, the Chief Justice held it to be the loss of the indorsee (1). *Strange pro def'.*

(1) *Anon.* 1 *Vent.* 45. *Dagglish* v. *Weatherby*, 2 *Black.* 747. S. P. adm. *Brough* v. *Perkins*, 3 *Salk.* 69. 2 *Ld. Raym.* 993. *Tindal* v. *Brown*, 1 *Term Rep.* 167. In like manner the holder if he presents a note or a bill, whether foreign or inland, for acceptance, must give notice of a refusal to accept, or the drawer will be discharged. *Goostrey* v. *Mead*, *B. L. N. P.* 271. *Blesard* v. *Hirst* & *al'.* 5 *Burr.* 2670. *Goodall* v. *Dolley*, 1 *Term Rep.* 712.

Hilary Term

1 Georgii 2. Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Francis Page, *Knt.*
James Reynolds *Esq.*
Sir Edmund Probyn, *Knt.*
} *Justices.*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq. Solicitor General.*

Lee *verf.* Welch.

Leaving out *fuper fe affumpfit* is ill on a judgment by default. L. Raym. 1516. S. C.

THE plaintiff declared in *C. B.* that the defendant was indebted to him in fo much money for goods fold and delivered, *et fic indebitat' exiftens bene et fideliter folvere et contentare vellet*, leaving out *in confideratione inde fuper fe affumpfit et eidem Willielmo adtunc et ibidem fideliter promifit, quod, &c.* And after judgment by default, it was reverfed on error, there being no promife actually laid in the declaration. 1 *Lev.* 164. 1 *Sid.* 246. (*a*) *Strange pro def' in errore.*

(*a*) S. C. T. Raym. 23. 1 Keb. 878.

Dominus Rex *verf.* Channel.

Indictment lies not againft a miller for detaining part of the corn. 1 Seff. Ca. p. 366. No. 290.

INDICTMENT againft the defendant, for that he keeping a common grift mill, and being employed by *William Bare* to grind three bufhels of wheat, did *vi et armis illicite* take and detain forty-two pounds weight of the wheat. Upon a demurrer judgment was given for the defendant, there being no actual force

force laid (1), and this matter of a private nature, for which an action would lie (2). 27 *Aff. pl.* 19. 2 *Keb.* 391. *Trin.* 3 *Geo. Rex* v. *Belfon*, 1 *Sid.* 209.

(1) *Vide Rex* v. *Storr*, 3 *Burr.* 1701. that *vi et armis* does not alone imply such a force as will support an indictment. See also *Rex* v. *Baker*, *ib.* 1735.

(2) *Rex* v. *Combrune*, 1 *Wilf.* 301. *Rex* v. *Wheatly*, 2 *Burr.* 1125. *Rex* v. *Dunnage*, *ib.* 1130. *Rex* v. *Ofborne*, 3 *Burr.* 1697. determined upon the fame principle.

Wilfon *verf.* Poulter.

In Middlefex coram Raymond *C. J.*

No parol evidence to explain a depofition.

IN trover the defendant was charged with his confeffion in a depofition taken before commiffioners of bankrupt, and the Chief Juftice refufed to let the defendant into any *parol* evidence to explain it (1).

(1) Parol evidence cannot be admitted *to vary* the *fubftance* of a written agreement. *Sheres & al'* v. *Ainfell & al'*, 3 *Wilf.* 275. *Prefton* v. *Merceau*, 2 *Black.* 1249. *Gunnis* v. *Erhart*, *C. B. H. Black. Rep.* 289. But it is admiffible where it does not contradict, but explain a deed or other inftrument. *Rex* v. *Samborn*, 3 *Term Rep.* 609. *Freeland* v. *Burt*, 1 *Term Rep.* 701. *Per Hardwicke* C. in *Baker* v. *Paine*, 1 *Vez.* 459. and in *Blunt* v. *Comyns*, 2 *Vez.* 331. So alfo to prove other confiderations than thofe expreffed in a deed. *Filmer* v. *Gott*, 7 *Bro. P. C.* 70. *Rex* v. *Scammonden*, 3 *Term Rep.* 474. *Contra Clerkfon* v. *Hanway*, 2 *P. Wms.* 203. But it has been admitted in equity to prove a variation between the intended and executed agreement upon a fuggeftion that it has happened through miftake, fraud, or the previous agreement of the contracting parties for a particular purpofe: and for the former caufes, more efpecially in executory articles and mercantile engagements. *Henkle* v. *Royal Exchange Affurance Company*, 1 *Vez.* 348. *Baker* v. *Paine*, *ib.* 456. *South Sea Company* v. *D'Oliffe*, 2 *Vez.* 376. *Lady Shelburne* v. *Lord Inchiquin*, 3 *Bro. Chan. Ca.* 338. *Harvey* v. *Harvey*, 2 *Chan. Ca.* 180. *Per Reynolds C. B. in Fitzgerald* v. *Lord Fauconberg*, *Fitzg.* 113. *Pitcairne* v. *Ogbourne*, 2 *Vez.* 375. *Et vide Hardwood* v. *Wallis*, 2 *Vez.* 195. *Lord Irnham* v. *Child*, 1 *Bro. Chan. Ca.* 93. where it was rejected. But fuch evidence feems more readily admitted as a defence againft a bill brought for the performance of a fpecific agreement, being in that cafe introduced to rebut an equity. *Legal* v. *Miller.* 2 *Vez.* 299. *Joynes* v. *Statham*, 3 *Atk.* 388. *Walker* v. *Walker*, 2 *Atk.* 98. *Eden* v. *Lord Bute*, 7 *Bro. P. C.* 404. 445.

Between the Pariſhes of Biſhops Hatfield *and* St. Peters in St. Albans.

Hired ſervant is ſettled where the ſervice is. 2 Seſſ. Ca. 136. No. 1. Foley 217. Fort. 318. Burr. S. C. 493. 1 Burr. 495. 2 Bott by Conſt 458. pl. 409. Cited and explained by Lord *Mansfield.* in *Alton* v. *Elvetham,* *Burr. S. C.* 424. Ante 528.

ORDER of two juſtices to remove a man and his wife and their daughter from *Hatfield* to *St. Peters.* Upon appeal to the ſeſſions, they ſtate the caſe ſpecially: that 3 *Auguſt* 1725. *Henry Langley* was hired in *St. Peters* by Mr. *Arnold* (who had no ſettlement there) for one year, to ſerve as his huntſman; that Mr. *Arnold* had a dog-kennel it *St. Peters,* where *Langley* was dieted and ſerved the year: but inaſmuch as *Arnold* himſelf had no ſettlement there, they vacate the order which ſent him to *St. Peters.* *Et per curiam,* The order of ſeſſions muſt be quaſhed, for this is exactly the caſe of the ſervant employed on the road to look after ſtage horſes belonging to one who lived elſewhere; and yet the ſettlement was adjudged to be where the ſervice was (1). *Strange pro St. Peters.*

(1) *Rex* v. *Eaſt Ilſley, Burr.* S. C. 722. S. P.

Dominus Rex *verſ.* Edwardum Elwell, Bart.

Where there is a conviction the court will not diſcharge on the warrant of commitment without having the conviction before them. L. Raym. 1514.

HE was brought up upon an *habeas corpus,* with a return of the cauſe of his commitment, which was upon a conviction of forcible entry and detainer. And it being moved to diſcharge him upon exceptions to the commitment; the court refuſed to enter into the conſideration of them, till the conviction was likewiſe regularly removed before them. But by conſent he was bailed in the mean time. And

B. R. cannot ſet fine on a conviction by juſtices of peace. 1 Barn. B. R. 30. 38, 39. 1 Seſſ. Caſ. 360. See the conviction in *Engliſh* 3 Lord *Raymond* by *Bailey* p. 360.

This term, the conviction being before the court, it appeared that there was no fine ſet by the juſtices, and it was therefore moved to be quaſhed. It was agreed on both ſides, that there ſhould be a fine; but it was inſiſted, that it being now before [*795] *the King's Bench by a *certiorari,* they might ſet the fine. *Sed per curiam,* We are not to execute the judgment of an inferior court. The conviction is to be upon view, and they who view the nature of the force are the propereſt judges what fine to ſet; and though a *certiorari* ſhould come, before the fine is ſet; yet it would be no contempt in the juſtices to compleat their judgment by ſetting one. *Lambert* indeed was of opinion, that the

(1) *Rex* v. *Hawks, poſt.* 858.

juſtices

juſtices could not ſet the fine at all; but upon what foundation, we can never imagine. The juſtices are not bound to do it upon the ſpot, but may take a reaſonable time to conſider of the fine; but then they cannot commit the party, whilſt they conſider of the fine; becauſe by the words of the act the commitment is to be till he has paid the fine. The conviction muſt be quaſhed, and the defendant diſcharged. *Rex* v. *Layton*, 2 *Keb.* 716. (1)

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(1) *Vide Rex* v. *A. Hall*, *Cowp.* 60.

Easter Term

1 Georgii 2 Regis. In B. R.

Sir Robert Raymond. *Knt. Lord Chief Justice.*

Sir Francis Page, *Knt.*
James Reynolds, *Esq*; } *Justices.*
Sir Edmund Probyn, *Knt.*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq*; *Solicitor General.*

Reynolds *vers.* Thorpe.

In avowries commencement of particular estates must be shewn. *See* 11 Geo. 2. c. 19. § 22. by which this is remedied. 1 Barn. B. R. 46. S. C.

IN replevin the defendant avowed for rent, and shewed that *A. habens titulum*, demised to him, and that he made an under-lease to the plaintiff. And on demurrer, it was resolved to be ill, according to the case of *Scilly* v. *Dally*, *Salk.* 562. 3 *Lev.* 193. 5 *Co.* 1. And judgment was given for the plaintiff.

Crutchfield *vers.* Scott.

Money may be brought into court at the suit of an executor. 1 Barn. B. R. 47. S. C. (1)

THE question was, whether in an action by an executor the defendant should be allowed to bring money into court. And on consideration it was held he might, and that the

(1) The report in *Barnard.* represents the court to be of opinion that the money might be brought into court, and yet it states the motion to have been refused.

1 effect

effect of it would be, not to make the executor pay, but only lose his subsequent costs (2). *Mich.* 3 *Geo.* 1. *Baker* v. *Turberville*, allowed so to do (3).

(2) *Knight*, executrix, v. *Dutchess of Hamilton, in Scacc.* S. P. *Bunb.* 44. 3 *Salk.* 104. *contra.*

(3) *Gregg's* case, *Salk.* 396. *B. R. Bryan* v. *Holloway*, *Barnes* 279. *C. B. contra.*

Wilkinson *vers.* Poole. [797]

THE court made the defendant pay costs for not going on to trial by proviso according to notice (1).

Defendant pays costs for not trying by proviso.

(1) *Vide Rex* v. *Pippet*, 1 *Term Rep.* 695. *Reading* v. *Grafton*, *Pract. Reg. C. P.* 405.

Evans *vers.* Higgs.

STRANGE moved to discharge the defendant out of execution, as being an ambassador's servant, *viz.* his *English* secretary. And it was objected, he did not lie in the house; and the words of 7 *Ann. c.* 12. are *domestick servants. Sed per curiam*, The nature of his employment requires his attendance at the house, and it is not necessary he should lie there. And the general words *all writs and processes shall be void*, take in this case, and therefore the execution must be set aside.

Privilege of ambassadors (1). L. Raym. 1524.

Hil. 4 *Geo.* 2. *Widmore* v. *Alvarez*. In the case of the *French* ambassador, it was ruled, that the person need not lie in the house, but he must do some actual service there.

Fitzg. 200.

(1) See the cases upon this subject collected 1 *Com. Dig.* (*Ambassador*) (B,) *p.* 441. *Vide* in addition *Hopkins* v. *De Robeck*, 3 *Term Rep.* 79.

Lancaster *vers.* French.

THE plaintiff being a carpenter, brought an action for these words, "He has charged Mr. *Andrews* for forty "days work, and received the money for the work, that might "have been done in ten days, and he is a rogue for his pains."

Words not actionable. 1 Roll. Abr. 55. pl. 24. 5 Mod. 398. Salk. 694.

After verdict for the plaintiff the judgment was arrested, the words not being actionable (1).

(1) *Bellamy* v. *Barker*, *ante* 304. *Ludwell* v. *Hole*, *ante* 696. *Kent* v. *Pocock*, *post.* 1168. *Jones* v. *Hearne*, 2 *Wilf.* 87.

Dominus Rex *verf.* Episcopum Chester.

Mandamus lies for a chaplain where the visitatorial power is suspended by the union of the office of visitor to that to which the *mandamus* is to be directed. 8 Mod. 364. 1 Barn. B. R. 52. *cited in And.* 181. 2 *Burr. Rep.* 1043.

MANDAMUS directed to the bishop as warden of *Manchester* college, to admit a chaplain. The bishop returns, that by the royal foundation, he is appointed visitor. And upon argument it was objected, that though a *mandamus* will not lie where there is a visitor free from any objection; yet here the two offices being in the same person, he cannot visit himself; and no case can be shewn, where the founder has once granted the whole out of him, and on such a temporary suspension, it has resulted back.

[*798]

**Et per curiam*, It is plain he cannot visit now, because his power is suspended, and these are powers that may cease, and revive, without inconvenience, since there is this court to resort to. In a lay corporation the founder and his heirs are visitors (1): in a spiritual one; the jurisdiction is here, unless there be an express visitor appointed: the ground of our interposing in this case is, that at present there is no other visitatorial power in being (2). A peremptory *mandamus* was granted. *Vide* 2 *Geo.* 2. *c.* 29.

(1) 1 *Black. Com.* 481.

(2) *Vide Herne's* case, cited 2 *Stilling*. Case of *Exeter College*, 1 *Burn's Ecc. Law*, title *College*, 411. *Green* v. *Rutherford*, 1 *Vez.* 471. *Rex* v. *Gregory*, *E.* 12 *Geo.* 3. 4 *Term Rep.* 240. n. (*a*) and the opinion of *Buller* J. in *Rex* v. *Bishop of Ely*, 2 *Term Rep.* 339. But it has been held that in the case of a private eleemosynary lay foundation, where no special visitor is appointed, and there is a failure of heirs of the founder, the right of visitation devolves upon the King, and must be exercised by him in his court of Chancery, and the court of *B. R.* on that ground refused to interfere by *mandamus* to compel the master and fellows of *St. Catherine's Hall* to declare one of the fellowships vacant, and proceed to a new election. *Rex* v. *The Master and Fellows of St. Catherine's Hall Cambridge*, 4 *Term Rep.* 233. *Et vide Anon.* 12 *Mod.* 232.

The Caſe of the Conſtables of Limington.

THEY were choſen and ſworn in at the leet; and the ſeſſions, on pretence that the election was not made according to the particular uſage of the place, made an order to diſcharge the appointment. And now the order of ſeſſions was quaſhed, for at common law they had nothing to do with the election of conſtables, and the 13 & 14 *Car.* 2. *c.* 12. gives it them only in the caſe of death or removal within the year (1).

Seſſions cannot diſcharge conſtables appointed at the leet.

Salk. 175. T. Jones 212.

(1) *Vide Rex* v. *Hewſon*, 12 Mod. 180. *Rex* v. *Goudge*, *poſt.* *p.* 103. 1 *Bac. Abr.* 439. 4 *Com.* 1213. *Rex* v. *Lone*, *Fitzg.* 192. 2 *Hawk.* *P. C.* *c.* 10. *ſ.* 49, 50. *Dig. Leet*, (M. 6.) 694.

Shaw *verſ.* Weigh.

Mich. 9 Geo. rot. 108.

UPON Not guilty in ejectment for lands in the county of *Flint*, on a trial at the grand ſeſſions, the jury find this ſpecial verdict.

That *Thomas Ravenſcroft* being ſeiſed in fee of the premiſſes in queſtion, by his will dated in *Auguſt* 1675. deviſed the ſame to his wife *Dorothy* for her life, and for her better ſupport, he alſo deviſed her 500*l.* to be raiſed by ſale of timber, or digging of coal; and after her deceaſe he deviſed the premiſſes to three truſtees and the ſurvivor of them, in truſt for his two ſiſters *Anne Lunsford* and *Dorothy Evatt*, equally between them, during their natural lives, without committing any manner of waſte; provided that whatever part of the 500*l.* ſhould be paid his wife by either of his ſiſters, the ſame ſhall be reimburſed to them by getting of coal upon the premiſſes only; and if either of his ſiſters ſhould happen to die leaving iſſue or iſſues of her or their bodies lawfully begotten, then in truſt for ſuch iſſue or iſſues of the mother's ſhare, or elſe in truſt for the ſurvivor or ſurvivors

Deviſe of lands and hereditaments to *A.* and *B.* in truſt for others in tail and in fee, is a deviſe in fee to the truſtees though there be not the words *heirs*, or *for ever*. Deviſe to *A.* for life, then to truſtees in truſt for his ſiſters equally, during their natural lives, without committing waſte, with proviſo that they ſhall be reimburſed whatever part of the 500*l.* they ſhall pay, by getting coals off the premiſſes, "*and if either of his ſiſters ſhould happen to die, leaving iſſue or* "*iſſues of her or their bodies, lawfully begotten, then in truſt for ſuch iſſue or iſſues of the mother's ſhare, or elſe* "*in truſt for the ſurvivor or ſurvivors of them, and their reſpective iſſue or iſſues, and if it ſhould happen* "*that both ſiſters ſhould die without iſſue as aforeſaid, and their iſſue or iſſues to die without iſſue or iſſues* "*lawfully to be begotten,*" then a deviſe over in tail male. The ſiſters take an eſtate for life only, with contingent remainders to their children. 3 Danv. 178. 8 Mod. 253. 382. Fort. 58. Fitzg. 7. 1 Barn. B. R. 54. 2 Eq. Ab. 184. pl. 28. S. C. 3 Bro. P. C. 469. Cited And. 339.

of them, and their reſpective iſſue or iſſues; and if it ſhould happen that both the ſiſters ſhould die without iſſue as aforeſaid, and their iſſue or iſſues to die without iſſue or iſſues lawfully to be begotten, then in truſt for *John Swift* in tail male, remainder to *Ravenſcroft Gifford* (the leſſor of the plaintiff) and the heirs male of his body, with ſeveral remainders over. That the deviſor died, and his wife entred, and enjoyed for her life; and on her deceaſe the two ſiſters entred and were poſſeſſed. That *Anne* (one of the ſiſters) died without iſſue, and *Dorothy Evatt* ſurvived her, and 9 *April* 1688. levied a fine, and ſuffered a recovery, to the uſe of herſelf in fee. That *John Swift* died without iſſue in the life of *Dorothy Evatt*, who is ſince dead alſo without iſſue, upon whoſe death *Ravenſcroft Gifford* entred and made the leaſe to the plaintiff, who entred and was poſſeſſed till ejected by the defendant: *ſed utrum, &c. Et ſi pro quer', pro quer'; et ſi pro def' pro def'.*

Upon this ſpecial verdict judgment was given in the court of grand ſeſſions for the defendant. And on error in *B. R.* the general errors are aſſigned.

Before they entred upon the main point, a previous queſtion was ſtirred by the counſel for the plaintiff, what eſtate the truſtees took by virtue of this will: and they contended, that though the deviſe was only to them and the ſurvivor of them, without the words *heirs* or *for ever*, yet the carving out ſo many eſtates of inheritance, that were to be ſerved out of the truſt, ſhews the intent of the deviſor to give them an eſtate in fee; ſince nothing elſe could be ſufficient to ſatisfy all the truſts. And 3 *Co.* 20. *b. Cro. Eliz.* 204. 2 *Cro.* 527. 6 *Co.* 16. *Salk.* 236. were cited, where the word *eſtate* carried a fee; here it is *houſes, lands, tenements,* and *hereditaments. Hob.* 2. *Mo.* 873. 1 *Ven.* 299. 2 *Jon.* 57. 2 *Lev.* 169. But this point was not conteſted by the defendant; and the court ſaid it muſt certainly be a fee in them; though if it ſhould not, the will would have the ſame effect, by the deviſee's taking as upon an immediate deviſe.

But the main queſtion aroſe upon the deviſe to the ſiſters, whether they were tenants for life or tenants in tail; which had this conſequence, that if they were but tenants for life, the fine and recovery by *Dorothy* the ſurvivor were no bar; but if they were tenants in tail, the remainder over to the leſſor of the plaintiff was barred.

And *Reeve pro quer'* argued, that under this will the two ſiſters were but tenants for life, with contingent remainders to their iſſue

issue in tail. The words of the will are strong for this purpose; he devises it to them two *equally between them during their natural lives without committing any manner of waste*, which shews his intent, that they should not have such an estate as would protect them in committing of waste. So is that other clause by which the sisters are impowered to reimburse themselves so much of the 500 *l.* as they shall pay, by getting of coals on the premisses only; which power will be useless, if it be construed an estate-tail. [800]

Here are no express words that give it for more than their lives, and it is indisputable, that in a deed it would be an estate for life only. But whether it shall be carried further in this case, which is a will, must depend upon the authorities that will be cited on either side. I expect to hear the case of *King* v. *Melling*, 1 *Vent.* 214. 225. cited against me; but upon that I must observe, that there was not this clause of being punishable for waste. In the case of *Backhouse* v. *Wells*, *Hil.* 12 *Ann. in B. R.* the devise was for and during the term of his natural life *only*, without impeachment of waste, and after his decease to the issue male of his body: and it was resolved, that this was but an estate for life, first, because of the word *only* that was added, and in the next place on account of the clause of being dispunishable of waste, which the court said ousted all pretence of an estate-tail, and was much stronger than the power to make a jointure in *King* v. *Melling*, for that was of service even after the devise was construed to be a tail, by enabling the devisee to make a jointure, without suffering a recovery. 3 Atk. 796. Abr. Ca. Eq. 184.

In the case of *Loddington* v. *Kime*, 3 *Lev.* 432. there was not the word *only*, but *without impeachment of waste* was in, and governed the resolution that made it but an estate for life.

And that which makes this construction the more reasonable is, that the remainders over to *Swift*, and the lessor of the plaintiff, are conceived in the proper terms to make it an estate-tail in them. It is to *John Swift* and the heirs male of his body lawfully begotten, and for want of such issue to *Ravenscroft Gifford* and the heirs male of his body, with remainders over. Now can it be imagined, that the devisor did not intend to pass different interests, when he made use of such different expressions? It proves in my apprehension, that he knew what words were most proper to carry an estate-tail, and that where he did not intend to pass a tail, he has not used them.

The words *survivor or survivors of them* must relate to the issue, and not to the sisters, because he makes use of the plural number, and there can be no survivors out of two sisters.

He made another point, that if it be conftrued an eftate tail, yet the leffor of the plaintiff will be intitled to a moiety; becaufe *Anne Lunsford* was tenant in common, and died before the recovery fuffered by the other fifter, the confequence of which is, [801] that the remainder was vefted in the leffor as to a moiety. 5 *Co.* 7. 8 *Co.* 85.

Bootle contra argued, that it was an eftate-tail in the fifters, with crofs remainders to their iffues. That *iffue* in a will is equivalent to *heirs of the body* will not I believe be difputed. It is always taken to be *nomen collectivum*, and in this fenfe the word *exitus* is ufed in the ftatute *de donis*. If then a devife to *A.* and his iffue is as ftrong as a devife to him and the heirs of his body, let us fee how it ftands upon the words of this will. Here it is to them two equally to be divided, and if they happen to die without iffue the remainder over: now I do not contend that this is an exprefs devife in tail, as in the former cafe put of a devife to *A.* and the heirs of his body; but it will be fufficient for me, if it be fuch a devife by implication: as it was conftrued in the cafe of *King* v. *Melling*, which was a devife to *A.* for life exprefsly, and after his deceafe to fuch iffue as he fhould have of the body of his fecond wife, (his firft then being alive) and it was held to be an eftate-tail in *A.* What difference is there between the two cafes? this only, that I can perceive (and which makes our cafe the ftrongeft) that in that cafe the words *for life* are exprefsly mentioned, but in our cafe they are not.

Will. Rep. 754. In the cafe of the Attorney General againft *Sutton* and *Paman*, which was in the houfe of Peers, *Hil.* 7 *Geo.* the decree indeed was reverfed as to another point, but as to the following point they agreed with the court below, that a devife to *A.* and his firft and fecond iffue male, without going any further, was an Abr. Ca. Eq. 185. eftate-tail. So in the cafe of *Langley* v. *Baldwin in C. B.* 19 *May* 1707. upon a cafe referred from my Lord Chancellor, the devife was to his eldeft fon for life without impeachment of wafte, and after his deceafe to my grandfon for life without impeachment of wafte, and with a power to make a jointure, and after his deceafe to his firft fon and the heirs male of his body, and fo as far as a fixth fon; and if my faid grandfon dies without iffue male, then he devifed it over: and the queftion was, whether the limitation ftopping at a fixth fon, and not going on to every other fon and fons, and there being the claufe as to wafte and for making a jointure, it fhould be an eftate-tail in the grandfon: and by the unanimous opinion of the court of *C. B.* it was refolved to be an eftate-tail: this cafe deftroys all the arguments drawn from the claufe againft committing wafte.

The

The case of *Loddington* v. *Kime* was adjudged upon the express words, "to *Evers Armin* for his life, and in case he shall "have issue male, to such issue male and *his* heirs for ever:" which word *his* related to the issue male, and not to *Evers Armin*: and also because in the same will he afterwards takes notice of that issue male as the person *to whom I have given the inheritance*: there the words (as I said before) were express and good sense, but here they are nonsensical, *if they die without issue, and the issue dies without issue*. L. Raym. 203. 209. [802]

As to the other point, by which Mr. *Reeve* would intitle the lessor to a moiety; he cited *Raym.* 452. Sir *T. Jones* 172. that these being cross remainders (1), and one dying without issue, the fine and recovery by the other would be a bar for the whole.

Pratt Chief Justice, I say nothing at present to be bound by, but as thus advised I think it a strong point that this is an estate-tail in the sisters. I cannot allow this to be a contingent remainder, it is only a description when the issue shall take; and certainly a devise to one and his issue, is the same as if it had been to him and the heirs of his body. In *Loddington* v. *Kime* it was but a *designatio personæ*. And as to the other cases cited by Mr. *Bootle*, I think them exactly the same with the present case.

Powys Justice *accord*, that it was an estate-tail.

Fortescue Justice, My present opinion is, that this is an estate-tail. *Issue* is the most expressive word that could be used, because it extends *in infinitum*. *Loddington* v. *Kime* does not come up to this, for *his heirs* was confined to the first issue, and was exactly the same with *heir male* in *Archer*'s case. The case of *King* v. *Melling* was adjudged to be a tail, because the word *issue* did not make a *designatio personæ*, which is in this case.

Raymond Justice, Certainly the adding any clause relating to waste can never alter the operation of law, and so said my Lord Chief Justice *Hale* in that case of *King* v. *Melling*. *Issue* may in some cases be a *designatio personæ*, but I see nothing in this case to make it so. The using the plural number, survivors, is the only word that looks that way: if you refer it to the two sisters, it will signify nothing; but it sticks with me, that it is not

(1) *Vide Comber* v. *Hill*, *post*. 969. *Brown* v. *Williams*, *post*. 996.

applica-

applicable to the caſe of two ſiſters only. *Per curiam, ulterius concilium.*

According to the report in *Forteſcue* it was argued 4 times.

Paſch. 11 *Geo.* it was argued a ſecond time: when *Reynolds* Juſtice inclined it but an eſtate for life; ſo it ſtood upon a *curia adviſare vult* till this term; when,

What words in a will create an eſtate for life only.

[803]

Raymond Chief Juſtice delivered the reſolution of the court. The term in the declaration being expired, it may be thought unneceſſary to deliver our opinions: but as there was judgment againſt the plaintiff below to pay coſts, and as if that judgment is erroneous he will be intitled to damages; he has a right to be relieved in theſe inſtances, though as to recovering the poſſeſſion he is too late. And we are all of opinion, that the judgment given below is erroneous, and ought to be reverſed.

The firſt queſtion that was made was, what eſtate the truſtees took by this will, it being only a deviſe to them and the ſurvivor of them, without the words *heirs*, or *for ever*. Now as to this we all think it muſt be conſtrued a deviſe in fee, becauſe otherwiſe it can never ſerve all the truſt eſtates which are carved out of it; and whoever reads the will, cannot but be ſatisfied that it was his intent it ſhould be ſo: it is therefore a deviſe in fee by implication (2); or if it was not, it would come to the ſame thing in this caſe, becauſe the deviſees for whom they are in truſt would take by way of immediate deviſe. 1 *Roll. Abr.* 611. *K.* 12.

The next and principal queſtion was, what eſtate the two ſiſters took, whether an eſtate tail, or for life only. If it was in tail, then the judgment below was right, and the fine a bar; if it was only for life, then the fine will be no bar, and the judgment wrong by which it is ſet up as ſuch.

And we are all of opinion, that the ſiſters took an eſtate for life only, with contingent remainders to their children; and this both from the words and intent of the will. As to the words: it is to them during their natural lives, without committing any manner of waſte, and theſe are the ſtrongeſt words that can be uſed in a will for that purpoſe. As to the intent: 1. The precedent deviſe to his wife is in the ſame words, and it is plain and manifeſt he intended ſhe ſhould have it but for life. 2. The

(2) *Vide Bagſhaw* v. *Spencer*, *Talb.* 145. *Gibſon* v. *Lord Mont.* 1 *Vez.* 144. 2 *Atk.* 576. S. C. *ſoit*, 1 *Vez.* 491. *Oates* v. *Cook*, *Chapman* v. *Bliſſet*, *Caſ. temp.* 3 *Burr.* 1536.

proviſo

proviso for raising the 500 *l.* is a strong argument he meant they should take only for life; for if it was in tail, they might fell timber, or dig what coals they pleased; and it is observable, that he has given the two sisters less power in that respect, than he gave his wife; for the wife could raise the money by sale of timber or digging of coal, but the sisters are to raise it by getting of coal only. 3. It is very observable, that the issue of the two sisters have not this power given them; which shews he knew, the general power they would have as tenants in tail did not need to have such a clause added for them. 4. The clause by which he restrains his sisters from committing waste is an evidence of his intent to give it but for life. 5. The words *and if either of my sisters happen to die leaving issue, then in trust for such issue*, do not make *issue* a word of limitation, but only a *designatio personæ*, he intended should take after his sisters. The word *issue* has not one determinate sense, in which it is to be taken in all cases, no not in common law conveyance, and much less in [804] a will, where the intent of the party is chiefly to be regarded. If a man makes a feoffment to *A.* and his issue male, this is not an estate tail in the feoffee, for want of the word *heirs.* 1 *Roll. Abr.* 837. *R.* 1. Where issue is a word of limitation, it is *nomen collectivum*, but where it is a *designatio personæ*, or a word of purchase, it is not. And though *Levinz* in his report of the case of *Loddington* v. *Kime*, (3 *Lev.* 435.) (*a*) takes notice that no judgment was given, but the parties accommodated the matter, yet he is mistaken in that, for *Pasch.* 9 *W.* 3. it was argued *seriatim* by the court, and the point determined that *Evers Armin*, took but for life (*b*); and the determination in Chancery and the House of Lords were both conformable to that judgment.

(*a*) 1 Salk. 224. 1 Eq. Ab. 182. c. 23. S. C.

(*b*) Vide 1 Ld. Raym. 203. 3 Wilf. 240.

The case of *Backhouse* v. *Wells*, (*c*) which was cited at the bar, and is entered *Trin.* 11 *Ann. rot.* 220. is likewise a strong case in point: for there the court relied very much upon the clause about impeachment of waste, to shew the intent of the devisor to pass only an estate for life, and to make the word *issue* a *designatio personæ*, and not a word of limitation (3).

(*c*) 1 Eq. Ab. 184. 10 Mod. 181. Gilb. Eq. Rep. 20. 129. Fort. 133. S. C.

6. The

(3) The word issue in a will is generally and properly a word of limitation. *Per Lord Hardwicke* C. in *Bagshaw* v. *Spencer*, 1 *Vez.* 151. *Per Gould* J. *in Roe* v. *Grew*, 2 *Wils.* 324. *Goodtitle* v. *Otway*, 2 *Wils.* 6. But it is taken either as a word of purchase or of limitation as will best effectuate the intent of the testator. Upon this ground it has been held to operate as a word of limitation in *Roe* v. *Grew*, 3 *Wils.* 322. *King* v. *Burchall*, *Amb.* 379. 4 *Term Rep.* 295. *n.* *Doe* v. *Collis*, *ib.* 294. *Dunn* v. *Puckey*, 5 Term

6. The words *survivor or survivors of them*, if they are of any use, must refer to the issue, and not to the two sisters, out of which there can be no survivors; and since they may consistently with the other words of the will be applied to the issue, we think they are too material to be rejected, and rejected they must be, unless they are so applied. The word *issue* may have a different construction, even in the same will (4): a devise to *A.* and his issue will make it a word of limitation; but if it be to *A.* for life, and after to his issue, and the issue or heirs of the body of such issue; in the first part it will be *designatio personæ*, and in the second a word of limitation: and that was the opinion of the court in both the cases of *Loddington* v. *Kime* and *Backhouse* v. *Wells*, where they did not intirely found their judgment upon the word *only*. In 1 *Vent.* 232. the words of limitation being grafted upon the word *heir*, was construed to make the first only a *designatio personæ*, and so was the case there mentioned of *Clark* v. *Day*, but the true name is *Cheat* v. *Day*, *Cro. Eliz.* 313. *Ow.* 148. *Mo.* 593. 1 *Roll.* 832. And though no judgment is entered on the roll, yet *Moore* says, the opinion of the court was given; and *Hale* cites it as such in the case of *King* v. *Melling*.

Vide the 4th ed. Essay on Cont. Rem. 228.

And as to that case of *King* v. *Melling*, it appears to have been ruled with great difficulty, and *Hale* himself was of two opinions about it: as it is, it must now be taken for law; though we will not go an inch further, because it is manifest, [805] that by such constructions people are let in to cut off intails contrary to the intent of the devisor. And there is this difference between that case and this, that there was no limitation over to the issue or heirs of the body of the issue, as here; so that our judgment will not contradict the case of *King* v. *Melling*.

And as to the cases of *Langley* v. *Baldwin* and *Sutton* v. *Paman*, cited by Mr. *Bootle*, they do not come up to this; for there

5 *Term Rep.* 299. It has been taken as a word of purchase, not only in *Loddington* v. *Kime*, and *Backhouse* v. *Wells*, here cited. But in Lord *Glenorchy* v. *Bosville*, *Cas. temp. Talb.* 3. *Meure* v. *Meure*, 2 *Atk.* 265. *Ashton* v. *Ashton*, 1 *Vez.* 149. which are cases of executory trusts created by will, and also *Doe ex dem. Barnard et al'.* v. *Reason*, 3 *Wils.* 242. *Vide the Essay on Cont. Rem.* 166. *et seq. ib.* 233.

(4) So different constructions may be put upon the same words in a devise, where they are applicable to different subjects. *Forth* v. *Chapman*, 1 *P. Wms.* 667. *Harris* v. *Bishop of London*, 2 *P. Wms.* 663. *Sheffield* v. *Lord Orrery*, 3 *Atk.* 388. *Earl of Stafford* v. *Buckley*, 2 *Ves.* 180.

it was construed an estate tail by implication upon the apparent intent that (5) the devisee's family should have it so long as there was any issue, though a limited number of sons were only mentioned in the will. And as to the word *only*, in the case of *Backhouse* v. *Wells*, we think the intent of the devisor is as strong, as if the same word had been in this will, and therefore that case is an authority in point.

So that upon the whole we are of opinion, that the two sisters took only an estate for life; the consequence of which is, that the fine and recovery, though they were a forfeiture of the estate for life, could not bar the remainder to the lessor of the plaintiff, against whom judgment was given below, which we think ought to be reversed, and judgment given for the plaintiff to recover damages, but not the possession.

Afterwards this cause went up to the House of Lords, on a writ of error brought by *William Sparrow* and others, and was argued by Mr. Attorney General and Mr. *Bootle* to make it an estate tail, and by Mr. *Fazakerley* and Mr. *Strange* to make it but an estate for life. And all the Judges being ordered to attend, took time to consider of it. And at another day nine were of opinion that it was but an estate for life, *viz*. *Raymond*, *Price*, *Page*, *Reynolds*, *Hale*, *Carter*, *Denton*, *Probyn* and *Comyns*; and *Eyre*, *Pengelly*, and *Fortescue* held it an estate tail. And many Lords who were of opinion to affirm being gone away, the judgment of *B. R.* was late at night reversed, upon a division of ten Lords against seven (6).

See the arguments of the counsel in Dom. Proc. in Fitzgib. and of Mr. J. Fortescue in his own Reports 82.

(5) *Vide Throustout* v. *Peake*, *ante* 15. *n*.

(6) If the fact can be considered as of any importance, it is stated in *Fort. Rep.* p. 90. that the judgment in *B. R.* was reversed *nemine contradicente*.

Trinity Term

2 Georgii 2 Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Francis Page, *Knt.*
James Reynolds, *Esq*;
Sir Edmund Probyn, *Knt.*
} *Justices.*

Sir Philip Yorke, *Knt. Attorney General.*
Charles Talbot, *Esq*; *Solicitor General.*

Matthews *verf.* Spicer.

In assumpsit the day is not material, and the plaintiff may allege a different one in his replication.
Fort. 375.
1 Barn. B. R. 54. 57. S C.
1 Roll. Abr. 792. pl. 14.
Cro. Car. 575.
Cro. Jac. 69.

THE plaintiff declared in *assumpsit* upon a promise made 26 *March* 12 *Geo.* 1. The defendant pleaded, that after the promise, and before the bill filed, *viz.* 2 *April*, he tendered the money. The plaintiff replied, that after making the promise, *scilicet* 12 *February*, he filed his bill, *&c. Dem' inde*, and *Reeve pro defendente* objected, that by the plaintiff's own shewing he has brought his action before the cause of action accrued; for the promise he declares on is 26 *March*, and his bill was filed 12 *February* before.

Sed per curiam, As the plaintiff would not in evidence have been confined to the day in his declaration, there is no reason he should be more confined in pleading. Indeed if this was a note, the day would be material, and an essential part of the agreement, from which he could not vary; but in the case of a common *assumpsit*, the day is alleged only for form, and therefore the defendant cannot confine the plaintiff to the day alleged in the declaration: and upon this distinction the cases of *Stafford* v. *Forcer*, *Pasch.* 1 *Geo.* 1. and *Cole* v. *Hawkins*, *Hil.* 3 *Geo.* 1. were adjudged. The plaintiff had judgment.

10 Mod. 311.
Ante 21.

Lady Falconbridge *verf.* Forreft.

IN an action of *fcandalum magnatum* the court refufed to change the *venue* from *Middlefex* to *Chefter*, becaufe it was to fend it into a county palatine, and there was no inftance of doing it in fuch an action (1). *L. Raym.* 1418.

Venue not to be changed into a county palatine, nor in *fcand' mag'*. 1 Barn. B. R. 60. 68. S. C. Poft. 1258.

(1) According to the report in 1 *Barnard.* 68. the court difcharged the rule, principally upon this ground. *Vide Duke of Norfolk* v. *Alderton*, *Salk.* 668. 1 *Lev.* 56. *Carth.* 400. S. C. *Lord Griffin* v. *Buckby*, *Barnes* 482. *Gilb. C. P.* 90. acc. With refpect to the courts changing the venue into a county palatine, the reafon given in *Godfrey* v. *Philpot*, 2 *Ld. Raym.* 1418. that the court can fend the record down by mittimus, &c. is doubted by *Buller* J. in *Rex* v. *Amery*, 1 *Term Rep.* 368. But the cafes of *Markham* v. *Norton*, and *Gowland* v. *Falkner*, cited 1 *Wilf.* 422. accord with the cafe in *Ld. Raym.* and contradict the prefent. *Vide Tindal* v. *Gwynne*, *poft.* 1270.

Wright *verf.* Canning.

THE writ of error was returnable before any judgment given; and on confideration it was held to be fuch a fault, as is not amendable by the ftatute 5 *Geo.* 1. *c.* 13. (1)

What writ of error is not amendable. L. Raym. 1531. 1 Barn. B. R. 62, 65. S. C.

(1) *Vide Rejindoz* v. *Randolph*, *poft.* 834.

Muttit *verf.* Denny.

IN ejectment againft two defendants, it was faid that they *intravit, expulit et amovit.* And after verdict *pro quer'*, I moved in arreft of judgment, and the court held it to be ill. But at another day they ordered it to be amended, though there was nothing to amend by, on the authority of *Cro. Jac.* 306. *Salk.* 48. and then the plaintiff had judgment (1).

Amendment. 1 Barn. B. R. 53. 63. S. C. Salk. 48. is contra. note to 2d ed.

(1) *Vide Doe* v. *Pilkington et al'.* 4 *Burr.* 2447. *Oates* v. *Shepherd*, *poft.* 1272. and the note.

Ante 612.

Henriques *verſ.* The Dutch Weſt-India Company.

If there be a warrant of attorney any time *pendente lite*, it is ſufficient (1). No damages for delay of execution are recoverable upon a *ſcire facias* againſt bail (2). L. Raym. 1532.

ERROR of the award of execution in *C. B.* in a *ſcire facias* againſt bail. The *placita* is of *Eaſter* term 11 *Geo.* with an *alias prout patet* of *Hil.* before. The *ſcire facias* is returnable in *octabis purificationis*, at which day the plaintiffs and defendant both appear by attorney, and imparl to *Eaſter* term. And after *nul tiel record* pleaded, there is judgment *quod quer' perfecerunt recordum*, and ſhall have execution for the debt and 6*l.* 10*s.* for damages and coſts they have ſuſtained by the delay of execution. Upon error the want of warrants of attorney is aſſigned, and a *certiorari* returned, that there are none either of *Eaſter* or *Hilary* term 11 *Geo.* And then the company come in and allege diminution, and bring up warrants of *Eaſter* term, the term in the *placita*, and plead *in nullo eſt erratum.*

[808] *Strange pro quer' in errore* objected, that as the *ſcire facias* is returnable in *Hilary* term ,and then the entry goes on, *et modo hic ad hunc diem veniunt* the parties by their attornies, a ſubſequent warrant in *Eaſter* term after will not warrant their appearance in *Hilary* term before. And the act for amendment of the law requires the warrant of attorney for the plaintiff to be entred of the term he declares, which in this caſe is *Hilary* term. 2. The judgment is for 6*l.* 10*s.* for damages and coſts which the plaintiffs ſuſtained by the delay of execution; now at common law there were no coſts in a *ſcire facias*, and the 8 & 9 *W.* 3. *c.* 10. which gives coſts on a *ſcire facias*, mentions only coſts of ſuit, but damages for delay of execution are given only on writs of error by 3 *H.* 7. *c.* 10. and the entry on writs of error is in this manner, but never in *ſcire facias.*

The court upon this ſtate of the objections were ſtrongly of opinion with them both. But another day *Reeve pro def' in errore* as to the firſt objection cited *Noke* v. *Caldecott*, *Trin* 8 *Geo. ante* 526. where it was held to be good, if there was a warrant of attorney at any time *pendente lite*; and there it was of a term ſubſequent to the *placita*: whereas here it is of the term in the *placita.* And upon the authority of that caſe the court overruled the firſt objection.

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(1) *Vide Noke* v. *Caldecot*, *ante* 526. *Brook* v. *Manning*, *Fitzg.* 191. 1 *Wilſ.* 39. *Dyke* v. *Sweeting*, *ib.* 183. S. P.

(2) S. P. *Fanſhaw* v. *Morriſon*, 1 *Salk.* 208. 6 *Mod.* 157. S. C.

And

And as to the second it was not attempted to be supported: but what was contended for was, that the judgment for damages is a distinct judgment, and comes in with a *consideratum est etiam*; and therefore according to the case of *Green* v. *Waller*, *Trin.* 2 *Ann.* and *Bellew* v. *Aylmer*, *Trin.* 5 *Geo.* 1. the court held, that it might be reversed as to the 6*l.* 10*s.* damages, and affirmed as to the rest. And the judgment was pronounced accordingly.

Where the judgment for damages is distinct, it may be reversed in part, and affirmed *pro residuo* (1). Lill. Ent. 233. Ante 188.

N. B. 23 *April* 1730, on error in Parliament the judgment of *B. R.* was affirmed, and 100*l.* costs given.

(1) *Bellew* v. *Aylmer*, *ante* 189. *Kent* v. *Kent*, *post.* 973. and the cases cited. But where costs are merely accessory to the principal judgment, if they are erroneously given, the judgment cannot be reversed as to them alone, but must *in toto*. *Lampen* v. *Hatch*, *post.* 934. *Rex* v. *Etherington*, 2 *Ld. Raym.* 870. *Salk.* 312. S. C.

Case of the Bailiffs of Bridgenorth.

A *Mandamus* was directed to the two bailiffs; one of which was for obeying the writ, and the other would not, nor join in a return. And the court granted an attachment against both, for they said it would be endless to try in all cases which was in the right, and it would be always used for a handle of delay.

Where a writ is directed to two, there must be an attachment against both, though one is ready to obey. (1) 1 Barn. B. R. 53. S. C.

(1) See the same principle laid down in the case of a penal action upon 3 *Geo.* 3. *c.* 15. *for not producing books containing the entries of freemen*, *per* Lord *Mansfield* C. J. *Schullam* v. *Bunnis*, *Cowp.* 197. *Et vide Rex* v. *Rye*, 2 *Burr.* 798.

Maylin et al' *vers.* Eyloe.

At Guildhall coram Raymond *C. J.*

[809]

On 28 *November*, *Hall* rode out of town, and returned in the evening, before which a bailiff had been at his shop to arrest him: the next morning he sent for the bailiff, and told him he went out in order to get the term of the plaintiff, and now the return of the writ was out, if they would take out a new writ he would give bail, which was done accordingly. And this was held to be an act of bankruptcy within 1 *Jac.* 1. *c.* 15. which speaks of *departing from his house with intent, and whereby his*

What an act of bankruptcy.

his creditors may be defeated or delayed from recovering their just debts (1). *Strange pro def'.*

(1) *Dickinson*, assignee, &c. v. *Foord, Barnes* 160. *Colkett* v. *Freeman*, 2 *Term Rep.* 59.

Bottomley *vers.* Harrison.

What a sufficient certainty in trover (1). L. Raym. 1529. 1 Barn. B. R. 47. 50. 65. S.C.

ERROR of a judgment by default in *C. B.* in an action of trover for several parcels of goods. And *Strange* objected, that the damages were intire, and as to one parcel of the goods it was too general, the words being *una parcella segestrium, involucrorum et funium, Anglice packcloths, rappers and cords*; so that there is not only the objection to the word *parcella*, which has been held ill; but there is likewise an incertainty as to what that parcel consists of. *Trin.* 1 *Geo.* 1. *Kempster* v. *Nelson, pro parcella lintei, Anglice childbed linen*, and *parcella papyri, Anglice writings*, was held ill in replevin. 2 *Show.* 433. Trover *de septem parcellis panni lintei*, too general. 2 *Lev.* 195. The word parcel likewise held ill in trespass, *Trin.* trover *pro diversis mercimoniis, Anglice earthen ware*, held ill.

Lee contra. *Parcella* in this case signifies a bundle; and though formerly these exceptions have prevailed, yet of late years more general expressions have been allowed. *Pecia* was formerly held ill, and yet *Hil.* 13 *Geo. Radley* v. *Rudge*, trover for a piece of *tepee* was held well enough. In 1 *Lev.* 303. *assumpsit pro quadam parcella* was held good, and it is there said it would be the same in trover. *Harford* v. *Jones*, 12 *W.* 3. trover for 72 ounces of cloves, mace, and nutmegs; and adjudged to be sufficient, though the particular quantities of each were not specified. *Mich.* 2 *Ann. Thornton* v. *Barnard.* Trover for so many *farcinis, Anglice bundles of flax*, and upon motion in arrest of judgment it was adjudged for the plaintiff.

Ante 738.

Salk. 654.

L. Raym. 991.

[810]

Strange replied. As to the case in *assumpsit*, there was always a greater latitude allowed; and will any man say that trover *pro diversis mercimoniis*, without specifying them, will lie? and yet it is every day's experience to declare so in *assumpsit*. Besides, the case I cited out of 2 *Lev.* is subsequent in time, and therefore destroys the authority of that case, if it had been applicable

(1) 1 *Ld. Raym.* 133. 191. 588. *Action upon the Case upon Trover, ante* 619. *post.* 827. 1 *Com. Dig.* (G. 5.) 317.

to

to this: and as to the case of the piece of *tepee*, that is a certain known quantity to people who deal in that commodity.

Et per curiam, We are not so strict now as formerly: a stack of hay, a library of books, which are an *integer*, have been held well: this may be taken to be a bundle, and the plaintiff has particularised all the several sorts of goods of which it consisted.In 2 *Sid.* 175. there is a case cited of three packs of linen cloth and other goods, and held certain enough; which is more general than this case: and the case cited of the several sorts of spices goes as far as this. And therefore though all the cases are not to be reconciled, yet since there are cases which will make this good, we are of opinion to hold it well and affirm the judgment.

Mich. 4 *Geo.* 2. *Hastlegrave* v. *Thompson*. Trover for 50 *peciis materiæ quadratæ*, *Anglice pieces of square timber wood*: and held well on error (*a*). And judgment affirmed.

(*a*) After judgment by default, MSS.

Paternoster *verſ.* Graham.

What is necessary on claiming conusance (1). 1 L. Raym. 428. S. C.

THE University of *Cambridge* claimed conusance, and produced the certificate of the Chancellor, that the parties were of the University. And upon the rule to shew cause it was objected, that the claim ought to be entred on a roll, and an affidavit to verify the certificate should be produced: and of that opinion was the court, and discharged the rule, and then it was too late to make a new claim.

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(1) *Vide Boot* v. *Graham*, 1 *Barnard B. R.* 49. 65. *Hayes* v. *Long*, 2 *Wilſ.* 310. *Woodcocke* v. *Brooke*, *Caſ. temp. Hard.* 241. *Leasingby* v. *Smith*, 2 *Wilſ.* 406.

Wyatt *verſ.* Winkworth.

Attachment against a witness for not attending a trial. L. Raym. 1528. 1 Barn. B. R. 45. 67. S. C. Barnes 33. S. C. and the cases there cited (1).

AN attachment was granted against *Rolfe Bayley* an attorney, for not attending at the assizes upon a *subpœna* and tender of his charges, whereby the plaintiff was nonsuited.

Paſ. 2 *Geo.* 2. attachment against one *Wyatt* for not attending *Japhet Crooke*'s trial.

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(1) *Hammond* v. *Stewart*, *ante* 510. and the cases there cited *Smalt* v. *Whitmill*, *poſt.* 1054.

Dominus Rex *verſ.* Browne.

Order of baſtardy.
1 Seſs. Ca. p. 329. no. 263. S. C. but not this point.

UPON an order of baſtardy it was ſtated, that the huſband had been abſent ſix years, and that during his abſence the defendant had had carnal knowledge of the wife, and therefore they adjudge him to be the putative father. *Et per curiam*, That order muſt be quaſhed, for his lying with her is not a ſufficient reaſon to infer him the father of this child: and though the juſtices need not ſhew the grounds they go upon, yet if they do, and it appears no ſufficient ground, their order will be bad.

Dominus Rex *verſ.* Gumley et al'.

Quinden' Trin. is of a *Sunday*.
L. Raym 1528.
2 Barn. B. R. 74. S. C.

THE *diſtringas* was returnable *die lunæ prox' poſt quinden' Trin.* And it was moved in arreſt of judgment, that it ſhould have been *in quinden' Trin'*, and the *dies lunæ prox'* is a week after the trial (1). But upon conſideration and inquiry into the practice both on the crown and plea ſide, it was held to be right, and that the return day is of the *Sunday*, though the buſineſs is done upon the next day; and ſo is *Salk.* 626. 6 *Mod.* 250. 1 *Show.* 60. So there was judgment for the King.

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(1) The facts and arguments as ſtated by *Ld. Raymond* are thus: The *diſtringas* was returnable *Tueſday next after fifteen days of the Holy Trinity*, and the day of *niſi prius* was *Monday next after fifteen days of the Holy Trinity. Trinity Sunday* was June the 16th, *the Octave* was *Monday* ſen'night being the 25th, the return *of fifteen days after Trinity* was *Monday* fortnight after *Trinity Sunday*, *viz. Monday July* the 1ſt. the day of *niſi prius*, therefore being the *Monday* next after *the fifteen days &c.* as that fell upon *Monday*, muſt have been *Monday July* the 8th, but the *diſtringas* was returnable on *Tueſday next after fifteen days*, &c. *viz. July* 2d. and by conſequence the day in bank was before the day at *niſi prius*, and this trial had *July* the 1ſt which was alſo before it. 33 *H.* 6. 45. *Dyer* 97. were cited to prove that a verdict taken after the day in bank was ill. But the court were of opinion that the *Quindena Trinitatis* was of the *Sunday*, all *octaves* &c. being incluſive, that therefore *Monday next after* 15 *days*, was *Monday July* the 1ſt. and the trial right. 2 *Lord Raymond* 1528. In *Waldegrave's* caſe, 12 *Mod.* 607. S. P.

King et ux' *verf.* Jones.

THE plaintiff *Jones* declared in *B. R.* againft *Judith Farnell* upon feveral promifes. She by the name of *Judith King* appears by attorney, and pleads *non affumpfit*. And after a verdict for the plaintiff, fhe and *Edward King* bring a writ of error *coram vobis*, and affign for error, that fhe has appeared and pleaded as a *feme* fole, whereas at the time of her appearance and plea fhe was married to the faid *Edward King*. The defendant in error pleads, that this *Edward King* and one *John Kitfon* became bail for her as for a *feme* fole, and fo relies on it by way of eftoppel, that they fhall not be admitted to aver againft the record: to this the plaintiff in error demurs. And *Strange* argued, that the bail put in is by the name of *King*, fo that the bail-piece is notice to the plaintiff: and befides it has been determined in the cafe of *Needham* v. *Dewaiver*, *Mich.* 2 *Geo.* 1. *B. R.* that the defendant cannot be eftopped by the act of the bail; and fo it was alfo held in *B. R. Trin.* 10 *W.* 3. *Fielding* v. *Villars.*

Coverture of the defendant after the action brought cannot abate the plaintiff's writ. L. Raym. 1525. 1 Barn. B. R. 70. S C. 1 Com. Dig. Abatement. (H. 42.) 80.

Ante 205.

And as to the coverture, he argued that it could not be pleaded in abatement, becaufe it was not fo at the bringing the plaintiff's writ; or if it might, yet her laches in not pleading it fhall not deprive the hufband of the benefit of affigning it for error: and fo it was held *Hil.* 4 *Geo.* 1. *B. R. Howard* v. *Sedgemore.* And *Trin.* 12 *Ann.* (*a*) *Gravener* v. *Stevens*, *Bro. Joinder en action* 88. *Error* 173. and in 1 *Roll. Abr.* 759. *pl.* 10. it is affigned in the very fame words as here. [812]

(*a*) 10 Mod. 166.

Sed per curiam, This is to abate the plaintiff's writ by the act of the defendant, which was never allowed: we muft take it that at the time of bringing the action the defendant was a *feme* fole, becaufe they pretend to carry it back no farther than the appearance. And plaintiffs would be in a fine condition, if after they have arrefted a woman fhe fhall be allowed to overthrow their proceedings by a fubfequent marriage. The judgment was affirmed

Michaelmas Term

2 Georgii 2 Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Francis Page, *Knt.*
James Reynolds, *Esq;* } *Justices.*
Sir Edmund Probyn, *Knt.*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq; Solicitor General.*

Barr *vers.* Satchwell.

Where a *scire feci* is returned the court will not set it aside for want of notice. Vide 2 Term Rep. 758. note.

A *Scire facias* was returnable on the general return day (which was *Sunday*) and not served till the *Monday*. On affidavit whereof Serjeant *Whitaker* moved to set it aside, the sheriff having returned a *scire feci*. *Sed per curiam*, If that be a false return, the defendant will have his action against the sheriff. But we will not try the truth of the return on a motion to set aside the proceedings.

Parker et al' *vers.* Godin.

What meddling with the effects of a bankrupt is a conversion (1). Bull. L. N. P. 47.

SATUR a bankrupt at the time of his going off left some plate with his wife, who in order to raise money upon it delivered it to her servant, who went along with the defendant to

(1) *Vide Wilson* v. *Poulter, post.* 859. *Perkins* v. *Hughes*, 1 *Wils.* 328.

 the

the door of Mr. *Woodward* the banker, and there the defendant, took the plate into his hands and went into the shop *and pawned it in his own name, gave his own note to repay the money*, and immediately upon receipt of it went back to the bankrupt's wife, and delivered the money to her. And in trover for the plate the jury (considering the defendant acted only as a friend, and that it would be hard to punish him) found a verdict for the defendant. [814] But upon application to the court a new trial was granted, upon the foot of its being an actual conversion in the defendant, notwithstanding he did not apply the money to his own use. And upon a second trial the plaintiff obtained a verdict for the value of the plate.

N. B. A difficulty arose upon the motion for a new trial, which was this. There were other things besides plate in the declaration, and as to them the verdict *pro def'* was right; and yet a new trial must be granted upon the whole. But on consideration the court held that could be no reason to refuse a new trial, for if the merits as to those other things were with defendant, it would be found for him as to them (2). But it was agreed on all hands, that if one defendant be acquitted, and another found guilty, that defendant can have no new trial (3). *Strange pro quer'.*

(2) *Rex* v. *Poole E.* 1734. *Bull. L. N. P.* 326. S. P.

(3) *Collier* v. *Morris*, *Mic.* 1735. *Bull. L. N. P.* 326. *Cap. Crabb's* case, 23 *Geo. ib.* S. P. *Fern's* case, *Hil.* 27 & 28 *Car.* 2. *Ib. contra.*

Bridges *verſ.* Williamſon.

Bringing money into court. *Hil.* 4 *Geo.* 2. *Mayne* v. *Sumner* the court made the same rule to bring in only the arrears. 3 Burr. 1374.

THE condition of a bond was to pay 40 *l.* by 5 *l. per annum*; and the defendant had leave to bring the arrears of the 5 *l. per annum* into court on the act for amendment of the law (1). *Ante* 515. *contra.* *Strange pro def'.*

(1) *Bonafous* v. *Rybot*, 3 *Burr.* 1370. *acc.*

Hopman *verſ.* Barber.

Officer muſt obey writ though fees unpaid.

ON a motion againſt *Bambridge* the warden of the *Fleet*, it was held that if a *habeas corpus* is brought, he muſt obey it, though the *party* refuſes to pay his fees; for he has a remedy for them (1).

(1) *Crompton* v. *Ward*, *ante* 433. opinion of *Forteſcue* J. *videtur contra*, *ſed vide*.

Moore *verſ.* Jones.

Action of covenant muſt be brought upon a deed (1). 5 Com. 618. *Per ſcriptum factum apud W. conceſſit* does not import a deed, neither does an allegation that the party covenanted *per quoddam ſcriptum*. If the inſtrument is ſet out upon error and concludes with, *In witneſs whereof I have hereunto ſet my hand and ſeal*, it will not make good this defect in the declaration (2). L. Raym. 1536. more full. 1 Barn. B. R. 62, 85. S. C.

ERROR of a judgment in *C. B.* in an action of covenant, wherein the plaintiff declared, that the defendant *per quoddam ſcriptum ſuum factum apud Weſtm' conceſſit* to the plaintiff an annuity *pro concilio impendendo*, and aſſigns the breach in non-payment for a certain time. (3). Upon *oyer*, which was ſet out *in hæc verba*, and concluded with, *In witneſs whereof I have hereunto ſet my hand and ſeal*; the defendant pleaded, that during that time the plaintiff gave no counſel; and on demurrer there was judgment by default for want of a joinder (4), and in *B. R.* general errors aſſigned.

[*815]

**Robinſon pro quer' in errore* objected, that the plaintiff had not in his declaration intitled himſelf to an action of covenant it not being ſhewn that the grant was by deed, without which covenant will not lie. 3 *Leon.* 192. *Cro. Car.* 180, 209. Here is no *ſigillo ſuo ſigillat'*; and the word *factum* here muſt be taken to be an adjective, to make ſenſe of the words *apud Weſtm'*: an *aſſumpſit* indeed might lie upon ſuch a writing. *Cro. El.* 117, 571. 3 *Lev.* 234.

(1) 3 *Com. Dig.* (A. 1.) 256.

(2) 5 *Com. Dig.* Pleader (2. V. 2.) 618.

(3) It was argued that the breach for non-payment was ill aſſigned, but the court gave no opinion upon the point. See the breaches ſet forth. 2 *Ld. Raym.* 1535.

(4) Another error was aſſigned that the reaſon of the judgment in *C. B.* was becauſe the plaintiff in error and defendant below, did not join in demurrer, and yet judgment was given againſt him as upon default, which could only be when a day was given him; but no day was given him here, and therefore the judgment ſhould rather have been entered as upon a *nil dicit*, but upon this point likewiſe the court delivered no opinion.

Huſſey contra. The *oyer* muſt be taken as part of the declaration, and by that it appears there was a ſealing (5). The words *convenit et conceſſit* imply a deed. 2 *Vent.* 106, 150. *Palm.* 173. 4 *Leon.* 173, 175. 2 *Roll. Rep.* 228. 1 *Lutw.* 333. *Godb.* 125. *Cro. Car.* 209. *Cro. Jac.* 420. *Cro. El.* 737. 2 *Lutw.* 1667. In 5 *Co.* 51. *b.* it is ſaid, a penſion cannot be without a deed; and why then ſhall not it be implied of an annuity? *Paſ.* 8 *Geo.* *Atkinſon* v. *Coatſworth*, *per indenturam convenit* was held good. Ante 512. The word *conventio* is a technical word, and the *Regiſter* is only *quod teneat conventionem.* The *oyer* may be taken either as part of the declaration or plea. *Cro. Jac.* 679. *Carthew* 513. And the plea of *non impendidit conſilium* admits the deed ſo far that in evidence it need not be proved. *Cro. Jac.* 682, 124. *Cro. Car.* 209.

C. J. None of the caſes come up to this, where the word *factum* by being joined to *apud Weſtm'* renders it impoſſible to be taken as a ſubſtantive. *Convenit* in a declaration would never do alone; and though it is alone in the *Regiſter*, yet that is only a ſhort deſcription of the nature of the cauſe, to be explained more at large when the plaintiff comes to count upon it. I do not ſee the plea has made it good.

Page J. If *ſcriptum* does not ſignify a deed, (as no body will pretend it does) here is nothing elſe to import it: the *oyer* does not prove it was actually ſealed, for every body knows the words *In witneſs*, *&c.* are in the inſtrument before it is ſo much as ſigned by the party. And indeed *oyer* of a ſealing was never heard of before.

Reynolds J. I think this declaration is not to be maintained. Anciently the words *ſigillatum et deliberatum* were required. But now it is held well enough to call it *factum*, *indentura*, *ſcriptum indentatum*, which imply the circumſtances of ſealing and delivery. Ante 512. A *conceſſit ſolvere* lies in *Briſtol*, and yet the word *conceſſit* does not imply a deed. Nor is there any thing in the plea which makes the declaration to be better than upon the face of it.

Probyn J. I do not think *convenit* a better word than *promiſit*, [816] for if the circumſtances of ſealing and delivery were ſhewn, *promiſit* would be well enough. The word *ſcriptum* alone will not make it to be a deed, and there is nothing elſe left to imply it. *Et per curiam*, The judgment was reverſed.

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(5) See this point argued at large, 2 *Lord Raymond*, 1540.

Dominus Rex *verf.* Robertum Hales.

Criminal profecution carried on at expence of private profecutor not triable *de jure* at bar otherwife where there is an authority from the King to profecute.
1 Barn. B. R. 88, 112. S. C.
Vide ante 644. poft. 826.

MR. Attorney moved for a trial at bar on an information filed by him for forgery. But it not being carried on at the expence of the crown, but of a private profecutor, the court held that he muft make out the ufual requifites to bring it to the bar. So the motion was denied. And at another day Mr. Attorney moved on an authority from the King to profecute, and it was granted as of right to the King in his own caufe. And in *Hil. fequen'* it was tried, and the defendant convicted. And in *Trin. fequen'*, being called to judgment, he produced a pardon, which was allowed; and being only for a mifdemeanor, he was not put to go the bar, or plead it upon his knees.

Smith *verf.* Mafon.

Addition.
L. Raym. 1541. S. C.

THE defendant was fued by the addition of Gentleman; and pleaded in abatement, that he was a merchant and not a Gentleman. And on demurrer a *refpondes oufter* was awarded. For the plaintiff has his election to fue him either by a name of degree or myftery, and the plea in abatement fhould give the plaintiff a better writ as to that particular fort of addition whereon he chufes to proceed (1).

(1) *Robinfon* v. *Mead, Com. Rep.* 371. *Contra, ante* 556. *R. acc.*

Dominus Rex *verf.* Upton.

Indictment lies not barely for a corrupt agreement.
2 Seff. Caf. p. 247. no. 168.
1 Barn. B. R. 97. S. C.

AFTER a verdict *pro rege* on an indictment for ufury; *Strange* moved in arreft of judgment, that they had only laid a corrupt agreement, without any loan or taking exceffive intereft in purfuance of it. And the judgment was arrefted.

Garnham *verf.* Bennett.

Where mafter and owners of a fhip are both liable for repairs.
1 Barn. B. R. 96.

ON a motion for a new trial, it was held, that *prima facie* the repairer of a fhip has his election to fue the mafter who employs him, or the owners: but if he undertakes it on a fpecial promife from either, the other is difcharged (1).

(1) *Farmer* v. *Davies*, 1 *Term Rep.* 108. S. P.

Ereskine *verf.* Murray.

IN case upon a bill of exchange against the acceptor, it was alleged generally, *quod acceptavit*. And on demurrer to the declaration exception was taken, that by 3 *Ann. c.* 9. the acceptance must be in writing, and therefore this ought to be alleged to be so. *Sed per curiam*, *Acceptavit* is enough, and if writing is necessary, it will be implied (1). Besides, the writing required by the statute is only in order to make the drawer liable to damages and costs. The plaintiff must have judgment.

3 Ann. c. 9. Need not aver the acceptance of a bill was in writing. L. Raym. 1542. 1 Barn. B. R. 87. S. C. Both reports fuller and containing other exceptions.

(1) That it is not necessary *vide Lumley* v. *Palmer*, *post.* 1000. and the cases there cited.

The Case of Landen Jones.

HE was committed for a contempt, and moved to have the benefit of the rules, which was denied. And *Trin. sequen'* Capt. *Hayes*, who was in execution for a forgery, and was to lye a year according to the statute, made the same motion, and had the same answer (1).

One committed for a contempt cannot have the benefit of the rules. L. Raym. 1518.

(1) *Post.* 845. *Rex* v. *Kinnersley*, *ante* 196. *Fowles* v. *Dineley*, *post.* 1122.

Palmer *verf.* Ekins.

3 Mod. 334

Intr. Trin. 11 Geo. 1. rot. 347.

COVENANT by the plaintiff as assignee of *John Palmer*; and declares, that 27 *March* 1716. *J. P.* was seised in fee of the demised premisses, and by indenture between him and the defendant he the same day demised to the defendant, to hold from *Lady-day* before for twelve years, at 18 *l. per annum*, payable quarterly; that defendant covenanted to pay the rent, and entered and enjoyed the house to *Lady-day* before bringing the action: that *John Palmer* being seised of the reversion, 22 & 23

A plea by lessee that the lessor made a conveyance in fee before the lease with a traverse, that he was afterwards seised in fee is a special, *nil habuit tenementis*. Where the lease is by indenture the lessee is estopped from so pleading even in covenant by an assignee of the lessor. It is also ill for the generality of the traverse, as it ties plaintiff up to prove an estate in fee, when any other would do. As a plea of *nil habuit*, &c. it may be taken advantage of on general demurrer, 1 Barn. B. R. 10[illegible]. S. C.

November,

November, 10 *Geo*, by indentures of leafe and releafe between him and the plaintiff fold the reverfion to the plaintiff and his heirs, of which the defendant had notice, and then affigns the breach in non-payment of rent. The defendant, *protestando* that *John Palmer* did not demife, for plea fays, that 19 *November* 1706, the faid *John Palmer* was feifed in fee of the demifed premiffes, and by leafe and releafe of 19 & 20 *November* 1706, fold the fame to *John Brag* and his heirs; and traverfes, that at any time after the date of the laft mentioned releafe *John Palmer* was feifed in fee as the plaintiff has alleged. To this plea the plaintiff demurred generally, and the defendant joined [818] in demurrer. And after feveral arguments at the bar, thefe points were refolved by the court.

1. That the demife being by indenture, the defendant could not plead *nil habuit in tenementis*: and indeed this point was not difputed by the counfel on either fide, but was taken for granted throughout the argument of the cafe (1).

2. That the defendant's plea was a fpecial *nil habuit in tenementis*, and was therefore no more to be received than a general one: the plea is of a feifin in fee in *Brag* ten years before the demife to the defendant: that fee being alleged muft in pleading be taken to continue, unlefs the contrary appears: nothing appears to the contrary; and confequently it is faying that *John Palmer* had no eftate in the premiffes at the time of the demife, the whole eftate in law being in another. Befides, there is no room to fuppofe a reconveyance from *Brag*, becaufe the defendant has alleged in the traverfe, that after *John Palmer* had once parted with the eftate out of him, he was never after feifed.

Dec. acc. T. Jones, 182.

Where eftoppel appears on the record, it need not be replied.

3. That this eftoppel needed not to be replied, but might be taken advantage of upon a demurrer; and that has been the ufual way of anfwering the plea of *nil habuit in tenementis*, *Salk.* 277. And fo is the general rule of pleading in *Co. Litt.* 303. fo it was done in *Cro. Eliz.* 362. and in the cafe of *Skipwith* v. *Green*, *Mich.* 11 *Geo. in B. R.*

Ante 610.

An affignee may take advantage of an eftoppel.

4. That though the plaintiff was an affignee, he might take advantage of the eftoppel, for it runs with the land. *Co. Litt.* 152. 4 *Co.* 53. *Salk.* 276. 1 *Roll. Abr.* 868. *L.* 2.

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(1) *Kempe* v. *Goodall*, *L. Raym.* 1154. *Salk.* 277. 3 *Lev.* 146. S. P. *ante* 611. But this eftoppel exifts only during the tenant's occupation. *Hayne* v. *Maltby*, 3 *Term Rep.* 441. *Per om' Juft'.*

5. That

5. That this was ill on a general demurrer. And

6. That if the plea did not amount to *nil habuit in tenementis*, yet it would be ill on account of the generality of the traverse, which ties up the plaintiff to prove the estate alleged in the declaration, when any other estate would do; even a disseisin would in this case, where it appears the tenant enjoyed under the lease. 2 *Vent.* 67. And it is no answer to say, that the defendant has traversed in the words of the declaration; for unless it be materially alleged, he is not to follow it. And so it was determined in this court in the case of *Colborne* v. *Stockdale*, *ante* 493. The plaintiff had judgment. *Strange pro quer'*.

Ovington, *vers.* Neale. [819]

Idem *vers.* Waller.

THE plaintiff declared upon a promissory note, by which the defendant and one *A. B. conjunctim aut separatim* promised to pay. There was a verdict and judgment in *C. B.* for the plaintiff. But upon error the judgment was reversed for want of the plaintiff's shewing a title to bring a separate action against one of the makers of the note, for by the present declaration he only says he has this *or* some other cause of action. *Strange pro quer'* (1).

A joint or several note how to be declared on. 2 L. Raym. 1544. S. C.

(1) *Butler* v. *Malissy*, *ante* 76. *acc. Rees* v. *Abbot*, *contra Cowp.* 832.

Bowers *vers.* Mann.

ON error *e C. B.* the *placita* was of *Mich.* 13 *Geo.* and the judgment was of the same term: the writ of error was tested 18 *Oct. primo Geo. secundi*, and the assignment of errors was of the *Trinity* term following: to verify the error as to want of an original, the plaintiff took out a *certiorari*, *teste* 21 *June* 1 *Geo.* 2. upon which there was a return, that there was no original: and the defendant in error upon that pleading *in nullo est erratum*, *Strange pro defendente in errore* objected, that the error was not verified, for the late King died 11 *June*, and there-

Errors are not verified by a *certiorari*, *teste* before the writ of error (1). L. Raym. 1554.

(1) According to the report in *L. Raym.* the ground of affirmance was, merely that the *certiorari* bore *teste* prior to the assignment of errors, and therefore could not be a *certiorari* to verify the errors upon that assignment. *Vide Bellew* v. *Scott*, *ante* 440.

fore

fore the *teste* of the *certiorari* being the 21 of *June primo* of the present King, and the writ of error in *October primo*, makes it to be four months before the bringing the writ of error, and a year before assignment of errors; the consequence of which is, that it cannot be taken as verifying the errors; nor indeed to be the *certiorari* which the court awarded, for they awarded one *after* the error was assigned, and this appears to be another taken out before.

No second *certiorari* to reverse a judgment.

The court thought the objection good, and affirmed the judgment; after they had refused a second *certiorari*, because it was in order to reverse a judgment: according to the case of *Merrifield* v *Berry*. *Ante* 765.

Lord Bruce's Case.

No *quo warranto* for a forfeiture by non attendance.

AN information *in natura de quo warranto* was moved for against him, upon a forfeiture of a recorder's place, by not attending; there being no clause in the charter impowering the corporation to remove. *Sed per curiam*, If it is an actual forfeiture, he is out, and you may chuse another (1): if not, it is but a misdemeanour, and a *quo warranto* will not lie. Besides, [820] the modern opinion has been, that a power of amotion is incident to the corporation (2), though *Bag's* case seems contrary. 11 *Co.* 93.

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(1) *Vide Reg. and the bailiffs of Ipswich*, 2 *L. Raym.* 1233. *Salk.* 443. S. C. That it is a cause for which he may be amoved, but it must be a general neglect and not a single omission. *Rex* v. *Corporation of Wells*, 4 *Burr.* 1999. 1 *Hawk. P. C. c.* 66. *f.* 1. *p.* 310.

(2) *Rex* v. *Richardson*, 539. *Rex* v. *Mayor &c. Lyme Regis*, *Doug.* 159. S. P.

Leglise *vers.* Champante.

At Guildhall.

Where probable cause is not sufficient. 19 Geo. 2. c. 34. § 16.

THE plaintiff brought an action against the defendant, who was a custom-house officer, for seizing several hogsheads of *French* wine, upon pretence of their being lees, which upon an information in the Exchequer had been determined against the officer. And now upon debate it was held, that in these cases

cases the officer seizes at his peril, and that a probable cause is no defence (1).

It appeared on the evidence, that the plaintiff had a partner in these wines, who was no party to the action. And the Chief Justice held, that if it was in an *assumpsit*, it might be taken advantage of at the trial, for it would not be the same contract (2); but it ought to be pleaded in abatement in the case of a tort.

Where another partner must be pleaded in abatement. Bull. L. N. P. 152.

(1) 12 *Vin.* 173. (P. l. 6.) *contra.*

(2) *Bull. L. N. P.* But in an action of *assumpsit against* one partner, the partnership must be pleaded in abatement, and cannot be given in evidence. *Rice* v. *Shute*, 5 *Burr.* 2611.

Page *vers.* Page. In Canc.

A. Devises to his six relations *C. D. E. F. G. H.* all his lands, *&c.* and all his personal estate, in trust, to perform his will, and after all these things discharged, directed *that the remainder* should be equally divided amongst them, share and share alike, and made his said six relations executors (1).

A. by will directs that the remainder of his real and personal estate should be equally divided amongst his six relations share and share alike, and he makes them his executors, one of the legatees dies in the life of the testator, his share of the personal estate lapses. 2 Will. Rep. 489. Mosl. 42. S. C.

C. one of the legatees died, and then *A.* the testator died. *Quære*, whether the share of *C.* dying in the life-time of the testator should go to the surviving residuary legatees, as part of the *residuum*, or whether, in this case, it should go to the next of kin of the testator, as so much of his estate undisposed of?

Mr. Solicitor General argued, that where there is a lapsed legacy, it falls into the *residuum* of the personal estate generally; but here a part of the *residuum* itself is the lapsed legacy, and consequently undisposed of, and ought to go to the next of kin of the testator; for the executors are to take nothing as executors, but as residuary legatees; and *C.* dying in the life-time of the testator, his share must go according to the statute of distributions, as undisposed of. And so it was decreed.

(1) According to the report in *P. Wms.* the devise was "*to each of them a sixth part.*" But the report in *Mosley* agrees with the present. *Vide Man* v. *Man*, *post.* 905. *Bagwell* v. *Dry*, 1 *P. Wms.* 700. *Owen* v. *Owen*, 1 *Atk.* 494. *Holderness* v. *Reyner*, cited *ib.* *Peat* v. *Chapman*, 1 *Vez.* 542. *Akeroyd* v. *Smithson*, 1 *Bro. Chan. Cas.* 503. *acc.* *Hunt* v. *Barkley*, *Mosl.* 49. 1 *Atk.* 496. *contra.*

Hilary Term

2 Georgii 2. Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Francis Page, *Knt.*
James Reynolds, *Esq.*
Sir Edmund Probyn, *Knt.*
} *Justices.*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq. Solicitor General.*

Gomez Serra *verf.* Munez.

Upon a bond bail justify as to double what is really due. Jews allowed to cover when they swear. 4 Ann c. 16. The court of Exchequer Chamber may try a release. Mod. 93. 106. 113. S. C.

UPON error in debt upon a bond, the bail is to be bound in double the penalty recovered (1), but by the course of the court it is sufficient if they justify in double what is really due. The bail in this case, being both *Jews*, were suffered to put on their hats while they took the oath.

The next day the defendant in error moved the court of Chancery for a *supersedeas* to the writ of error, on an affidavit that he had a release of errors, which he could have no benefit of in the Exchequer Chamber, for want of a power in that court to try the

(1) In error on a judgment in debt upon a bond it was insisted, that the bail ought to justify in double the sum, judgment was given for; but the court held it sufficient if they justified in that sum, it being double the debt really due. *Moore* v. *Lynch*, 1 *Wils.* 213.

the releafe. To which it was anfwered by the counfel for the plaintiff in error, that it was a vulgar error to imagine they could not try it, the ftatute 27 *Eliz. c.* 8. having given them power *to examine all errors, and thereupon to reverfe or affirm as the law fhall require:* and it was the higheft abfurdity to imagine a court to be fo conftituted, as to be obliged to reverfe a judgment for an error [822] which the party (having given a releafe) has no right to affign: Befides, the notion that they cannot try a releafe, proceeds from confounding the cafe of a releafe of errors with that of affigning error in fact, and taking up with a wrong reafon why a man cannot affign error in fact, and concluding from thence that he cannot plead a releafe. The wrong reafon that has been given is, that they have no power to award a *venire* to try the error in fact; but the true reafon is, that the ftatute of *Eliz.* was only to give a new remedy where there was none before: now before the ftatute the King's Bench did, and ftill does, examine their own errors in fact upon a writ of error *coram vobis*; and it never was the intent of the ftatute to take away the jurifdiction of the King's Bench, but only to give a new one in the inftances where it was wanted. *Et per King* Lord Chancellor: I think it is a great abfurdity to imagine, that the court that is to hold plea on the writ of error fhould not have power to do juftice by giving the party the benefit of his releafe: I think they may try the releafe, and award a *venire* under the feal of the court of Exchequer; and if they may, I can fee no reafon why I fhould deprive the party of the benefit of a trial by a jury, by inquiring into the validity of this releafe upon a motion to fuperfede the writ. I will make no order in the cafe. *Strange pro quer' in errore.*

Burroughs *verf.* Willis.

UPON a motion to change the venue from *Middlefex*, it was infifted, that the plaintiff was a mafter in Chancery, and a barrifter at law, and therefore had a privilege to lay his action in *Middlefex*; and a cafe was cited in *C. B. Hil.* 9 *Geo.* *Hicks* v. *Foot*, where it was fo held, and the cafe of *Carter* v. *Dormer* (*a*) in *C. B. Trin.* 13 *Geo.* and *Salk.* 668. and now upon confideration the court refufed to change the venue, but declared they did it on account of his being a barrifter, and not as a mafter in chancery (2).

Barrifter may lay the venue in *Middlefex* (1). L. Raym. 1556. 1 Barn. B. R. 114. Fitzg. 40. S. C. (*a*) Co. Ca. of Prac. 33.

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(1) The report in *Fitzg.* ftates the ground of refufal to be that the plaintiff was a mafter in chancery.

(2) *Spelman* v. —— 1 *Wilf.* 159. S. P. *et vide Pope* v. *Redfearne*, 4 *Burr.* 2027. and the note by Sir *James Burrow*.

Bowington *verf.* Parry.

Laced head cannot be brought into court.

IN trover for a laced head, *Strange* moved to bring it into court, but was denied (1).

(1) *Olivant* v. *Perineau*, *poft*. 1191. S. P.

Goodchild *verf.* *Chaworth*.

Capias ad fatisfaciendum againft bail, *gift*. 1 Barn. B. R. 126. S. C.

A *Capias ad fatisfaciendum* was taken out againft bail on a writ of error, and the court refufed to fet it afide: though 1 *Roll. Abr.* 898. 3 *Salk.* 286. is, that it will not lie. *Strange* for the bail.

[823]

Fergufon *verf.* Cuthbert.

No prohibition for *ftrumpet*. Bunb. 260. S. C.

A Prohibition was moved for to a fuit in the fpiritual court for calling a woman *jilt and ftrumpet*, and faying *he would cut his wife's legs off if fhe was fuch a ftrumpet*. And denied, for *per Cur'* they are a charge of incontinence, and the fignification of them well known (1).

(1) *Cook* v. *Wingfield*, *ante* 555. S. P. *et vide Hodgkins* v. *Corbett* *ante* 545.

Hunter *verf.* Wifeman.

Where a prior recovery in the fame court is pleaded, *oyer* muft be given. (*a*) 1 Barn. B. R. 280.

THE defendant pleaded a recovery in *B. R.* and inftead of replying *nul tiel record*, the plaintiff obtained a rule for the plea to be rejected, unlefs *oyer* was given of the judgment; according to *Carthew* 453, 517. it being a record of the fame court. *Trin*, 3 *Geo.* 2. *Gwinnel* v. *Thompfon* (*a*) the fame rule.

Fox *verf.* Glafs.

Practice. Salk. 518.

THE court had long refufed to fet afide a judgment which was regular, on putting the plaintiff in as good a condition. But upon preffing the practice of *C. B.* I broke through it in this caufe, and now they do it every day.

Ford *verſ.* Fleming.

In Canc. coram King *Lord Chancellor.*

THE caſe was this. *Jane Fleming* made her will in this manner as to the matter in queſtion.

She gives by will 40 *l.* to her grandaughter being part of a debt due and owing for rent, ſhe allowing the charges for getting in the ſame, the teſtatrix afterwards recovers the debt, *this is no ademption of the legacy.* Abr. Ca. Eq. 302. pl. 3. 2 Will. Rep. 469.

" *Item*, I give and bequeath to my grandaughter the ſum of " 40 *l.* being part of the debt due and owing from *G. Maxton* for " rent, ſhe allowing the charges in getting in the ſame. *Item*, " I give the reſt and reſidue of what is owing to me from ſaid " *Maxton*, which is about 40 *l.* more, to my two grandſons to " be equally divided between them, allowing the charges as " aforeſaid. And then by a codicil ſhe orders, that her execu- " tors, or whomever it ſhould concern, ſhould take no more of " *G. Maxton* than what would anſwer the charges of getting in " the ſaid debt."

Before the teſtatrix's death ſhe recovered the debt; and the ſingle queſtion was, whether this was an ademption of the legacy or not. [824]

Lord Chancellor, It is not: this is a deviſe of a particular ſum of money; and the debt is only appointed as the fund, out of which it is to ariſe. *Raym.* 335. there is a diſtinction taken, where a debt is deviſed, the receipt in that caſe by the teſtator would be an ademption. But where a ſum is deviſed payable out of a debt, the receipt of that debt is no ademption (1).

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(1) A diſtinction has been relied upon that where the teſtator himſelf calls in the debt it ſhall be an ademption of the legacy, but that it otherwiſe where the debtor has paid it in uncalled for, in *Orm* v. *Smith*, 1 *Eq. Ca. Abr.* 302. *pl.* 3. *Crockat* v. *Crockat*, 2 *P. Wms.* 105. *Ryder* v. *Wager*, 340. *Birch* v. *Baker*, *Moſl.* 373. *Partridge* v. *Partridge*, *Ca. Temp. Talb.* 228. But this difference has been held immaterial in *Earl Thomond* v. *Earl Suffolk*, 1 *P. Wms.* 464. *Aſhton* v. *Aſhton*, 3 *P. Wms.* 386. *Drinkwater* v. *Falconer*, 2 *Vez.* 623. *Attorney General* v. *Perkin*, *Amb.* 566. *Hambling* v. *Liſter*, *ib.* 401. *Aſhburner* v. *Macguire*, 2 *Bro. Cha. Rep.* 108. *Humphreys* v. *Humphreys*, in *Chan.* 24 *July* 1789. *Coxe's P. Wms.* 330. *n.* 1. where theſe caſes are collected.

Dominus Rex *verſ.* Roger' Johnſon.

Outlawry for treaſon reverſed on defendant's coming in within the year.
In a capital caſe the court will not appoint a trial at bar unleſs the defendant is preſent.
1 Barn. B. R. 79, 90, 91, 95, 101, 111, 123.
Foſt. C. L. 46.

THE defendant in *April* 1727. was committed to *Newgate* for high treaſon in diminiſhing the coin; and upon 17 *June*, before he was indicted, he made his eſcape: upon 11 *June* 1728. he was retaken at *Newcaſtle*, having during his abſence, *viz.* 3 *July* 1727, been indicted for high treaſon, upon which proceſs iſſued againſt him in order to outlaw him, and 8 *February* after (which was the *February* before his being retaken) he was declared outlawed. He was brought up to *Newgate*, and in the beginning of *Michaelmas* term laſt moved for a *habeas corpus*, by virtue of which he was brought to the court, and deſired the benefit of a trial, according to 5 & 6 *E.* 6. *c.* 11. he now ſurrendering himſelf to the Chief Juſtice, and offering to traverſe the indictment, having been beyond ſea at the time of the outlawry, and being ſtill within the year. The outlawry not being removed, the court ſaid they could only make a minute of his prayer, and ordered a *certiorari* to remove the proceedings from the *Old Bailey*, and that the defendant ſhould be brought up again upon the return of it. When the *certiorari* was returned, the court made little difficulty of allowing him the benefit of the ſtatute, though it was mentioned, but not much inſiſted upon, by Mr. Attorney, that it was not a voluntary render, but a compulſory recaption, and therefore not within the act, according to Sir *Thomas Armſtrong*'s caſe, *Vol.* 3. *State Trials* 334. But the court ſeemed very unwilling to hear any thing of that caſe; ſaying it was very hard, when the law had given a man a year to come in, that by taking him up before the year was out, the benefit of that law ſhould be taken from him, if he could bring himſelf within the deſcription of it. Whereupon being aſked what he had to ſay why execution ſhould not be done upon him; he delivered in a plea in *Latin*, and ingroſſed on parch*ment ſtampt, ſetting forth that he being *ductus ad barram* did ſurrender himſelf to the Chief Juſtice, and offered to traverſe the indictment; and as to the outlawry he pleaded, that at the time it was pronounced, and long before and after, he was reſident beyond ſea out of the dominion of his Majeſty, *viz. apud Fluſhing* in *Zealand*, under the dominion of the States General, whereby he was diſabled to render himſelf; and avers the identity of his perſon, and the high treaſon for which he was committed and indicted and outlawed, and prays judgment, if upon that outlawry the court will proceed any farther againſt him. And as to the high treaſon he pleads Not guilty. Upon putting in this plea Mr. Attorney deſired a copy of it, and time to conſider it; and the next day the defendant being brought up again, Mr.

N. B. Mr. Attorney General allowed at the bar that this caſe admitted of a diſtinction from Sir *T. Armſtrong*'s caſe, becauſe here the defendant brought the firſt *habeas corpus* at his own inſtance, and offered at the return to ſurrender to the Chief Juſtice; in the other the *habeas corpus* was *pro rege*, in order to have execution awarded.

[*825]

Mr. Attorney objected, that he should not have pleaded to the indictment, till his other plea of being beyond sea was determined; and it being taken notice of, that in Sir *Tho. Armstrong's* case it was pleaded *ore tenus* at the bar, the court thought it would be better that the defendant should take back the plea: and Mr. Attorney consenting, the plea was delivered back, and he ordered to be brought up again on 25 *November*, and notice to be given to the sheriff, to be prepared with a jury. 1 Sid. 72. 1 Lev. 61. K lyng. 13. 1 Keb. 244.

It was debated, whether he could not at the same time, if he was found to be beyond sea, be called upon to plead to the indictment, and try that issue also at the same time: but upon consideration, it was found he could not, because till his being beyond sea was found, he could not plead; and after his plea there must be fifteen days between the *teste* and return of the *venire*, it being an indictment removed by *certiorari*.

It was debated likewise, whether in case it was found for him as to this plea, the indictment could not be sent back to be tried at the *Old Bailey*: but upon looking into the act 6 *H.* 8. *c.* 6. it was found to extend to felons and murderers only, and not to treason.

Upon the 25th of *November* he was brought up: and without taking any notice of the former proceedings, the outlawry against him was read, and he was called upon to know what he had to say, why execution should not be awarded: upon which he pleaded *ore tenus* his being beyond sea at the time of the outlawry pronounced; and the Attorney General *instanter* replied *ore tenus*, that he was then within the realm, and traversed that he was beyond sea according to his plea, and offered an issue upon it; the defendant thereupon said he joined issue, and the jury came instantly to the bar and were sworn (1). And then *Strange pro def'* (for it was agreed he was to have counsel as to fact and law both, in this collateral issue, though not on the indictment itself, the offence as to the coin being excepted out of the statute of King *William* 3.) opened the issue; and several witnesses were examined, to prove him beyond sea: and after the King's counsel had been heard, and examined their witnesses; the prisoner's counsel replied, and afterwards the evidence was summed up; and the jury found the issue for the defendant. Q. 1 Keb. 244. [826]

Upon bringing in this verdict the defendant was immediately arraigned, and pleaded Not guilty. And he was ordered to be

(1) *Vide Rex* v. *Davis*, 1 *Burr.* 638. *Ratcliffe's* case, *Fost. Cr. Law* 41. 1 *Black. Rep.* 3.

tried at the bar the next term. Upon the first day of which the Attorney moved the court to appoint a day for trial; but the defendant not being at the bar, the court would make no rule, it being a capital case. And he was the next day brought to the bar, and then the time for trial was fixed; and upon the evidence the defendant was acquitted.

Baldwin *verf.* Morgan.

Equitable costs cannot be levied out of the penalty of a recognizance of bail. 2 Barnard. B. R. 125. S. C. with some difference.

THE plaintiff out of the penalty of a recognizance of bail levied not only the money recovered, but some costs, not included in the judgment, but such as he had really been put to: and upon motion it was held, that though equitable costs may be levied out of the penalty of a bond, yet it was too hard to suffer it to be done against the bail: and so the overplus money was ordered to be returned. *Strange pro quer'.*

Searle *verf.* Lord Barrington.

The indorsement of interest being paid within twenty years, shall be given in evidence though under the hand of the obligee. L. Raym. 1370. 8 Mod. 278. 3 P. Wms. 297. note [D] 3 Bro. Par. Ca. 535. S. C.

THE plaintiff brought an action on a bond entred into to her husband by one *Wildman*, under whom the defendant claimed, and the bond was dated 24 *June* 1697. The defendant pleaded *solvit ad diem*, and relied upon the presumption, it being after twenty years (1): to encounter which the plaintiff at the first trial of the cause, which was in *Trin.* 10 *Geo.* 1. offered to give in evidence the indorsement of interest under the hand of the obligee in the year 1707 which was three years before the death of the obligor: but *Pratt* C. J. before whom it was, being of opinion it ought not to be given given in evidence, from the danger of letting the obligee make indorsements, which might be done at any time; the plaintiff was nonsuit, and afterwards moved the court against the opinion of the Chief

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(1) That the lapse of 20 years without any demand or payment upon a bond shall, *in itself*, form a presumption that it has been discharged. *Vide Moreland* v. *Bennet, ante* 652. *Flower* v. *Bolingbroke, ante* 638. In the *Winchelsea causes*, 4 *Burr.* 1963. *Forbes* v. *Wale*, 1 *Black.* 532. *Oswald* v. *Legh*, 1 *Term Rep.* 270. In which last case, and in *Rex* v. *Stephens*, 1 *Burr.* 434. it is said by Lord *Mansfield* that the time in which a bond shall be presumed satisfied, is not fixed to 20 years, it may be in 18 or 19. *Buller* J. takes this distinction, that 20 years shall in itself form a presumption, but in less time payment shall not be presumed without other evidence in favour of the presumption. *Oswald* v. *Legh*, 1 *Term Rep.* 272.

Justice

Juſtice; and upon debate the other three Judges were of opinion, it ought to have been left to the jury; for they might have reaſon to believe it was done with the privity of the obligor, and the conſtant practice is for the obligee to indorſe the payment of intereſt, and that for the ſake of the obligor, who is ſafer by ſuch an indorſement, than by taking a looſe receipt. But an [827] objection ariſing, that after a nonſuit the plaintiff was out of court, and could not have a new trial, no rule was made, and ſhe was left to bring a new action (2).

Accordingly a new action was brought and tried at *Guildhall* before Chief Juſtice *Raymond*, who ſuffered the indorſement to be read, and the jury found for the plaintiff. The defendant tendered a bill of exceptions, which was ſealed: and after judgment for the plaintiff, a writ of error was brought in the Exchequer Chamber, and the bill of exceptions returned as parcel of the record. And upon argument Chief Juſtice *Eyre*, Chief Baron *Pengelly*, *Denton*, *Hale* and *Price* were of opinion to affirm; and *Carter* and *Comyns* to reverſe. So the judgment of *B. R.* was affirmed this term (3).

In *February* 1730, this judgment was affirmed in Parliament.

Hil. 13 *Geo.* 2. *B. R. Turner* v. *Criſp*, the Chief Juſtice refuſed to let the indorſement of a receipt of part of the bond, after the preſumption had taken place, to be given in evidence; ſaying it differed from this caſe, where the indorſement appeared to be made before it could be thought neceſſary to be made uſe of to encounter the preſumption (4).

(2) But it is now ſettled that a new trial may be granted where the plaintiff is nonſuited through a miſtake of the Judges in point of law. *Sadler* v. *Evans*, 4 *Burr.* 1986. in *B. R. Temple* v. *Wells*, and *Bagſhaw* v. *Wynn*, cited *ib.* *Harris* v. *Butterly*, *Cowp.* 483. *Mewburn* v. *Langley*, 3 *Term Rep.* 2. *Mascall* v. *Hogg*, 3 *Wilſ.* 140. *Rackham* v. *Jeſſop*, *ib.* 332. S. P. in *C. B.* See alſo *Forbes* v. *Wale*, 1 *Black.* 532. in *B. R.* *Love* v. *Dry*, *Barnes* 311. *Hartley* v. *Atkinſon*, *ib.* 317. *Contra* in *C. B.*

(3) How far entries in private books are evidence to affect the intereſt of third perſons. *Vide* *Warren* v. *Grenville*, *poſt.* 1129.

(4) In *Barnes* v. *Ranſom*, 1 *Barnard. B. R.* 432. a ſimilar indorſement ſeems to have been admitted, though made after the preſumption had taken place. But in *Glyn* v. *The Bank of England*, 2 *Vez.* 43. Lord *Hardwicke* took the ſame diſtinction as was done in the preſent caſe. In a copy of *Select Caſes of Evid.* 152. (where this caſe is alſo reported) formerly in the poſſeſſion of the late Mr. J. *Wilſon*, and now in that of the editor, it is ſtated that "at the Sittings after *Michaelmas* term at "*Weſtminſter* 6 *Geo.* 3. Lord *Camden* ſaid, that he was never "much pleaſed with the determination of *Searle* v. *Lord Barrington*, however he ſaid it was "law."

Emery *verſ.* Barlett.

In an action upon an account ſtated, the items need not be laid to have become due *infra juriſdictionem* in an inferior court.
(1)
L. Raym. 1555.
1 Barn. B. R. 128. S. C.
L. Raym. 795. 1040.
Rep. alſo 6 Mod. 223.
Holt 13.
Salk. 404.

UPON error out of the court of *Litchfield* it was objected, that the *items* of a ſtated account were not laid *infra juriſdictionem*. But the court held it enough to lay the account to be ſtated within the juriſdiction; and that as a *venue* was not neceſſary to be laid as to the *items*, there was no occaſion to aver them to have ariſen within the juriſdiction. Caſes cited were *Davis* v. *Stanyard*, *Mich.* 3 *Ann.* for immoderate riding and whipping a horſe, and held the whipping need not be laid *infra juriſdictionem*. *Lutw.* 256. 261. 15 *E.* 4. 4. *Hob.* 88. 1 *Saund.* 73. *All.* 72. *Sti.* 132. 2 *Lev.* 165. 2 *Jon.* 47. *Mod. Ca.* 223. The judgment was affirmed.

(1) *Vide Trevor* v. *Wall*, 1 *Term Rep.* 151.

White *verſ.* Graham.

Trover for a parcel of diamonds.
(1).
Ante 809.
2 L. Raym. 1530.
[828]

ERROR of a judgment *e C. B.* in trover for a parcel of diamonds. And *Strange pro quer' in errore* would have diſtinguiſhed this from the caſe of *Bottomley* v. *Harriſon*, which was trover for a parcel of packcloths, wrappers, and cords; becauſe that was taken as a bundle of ſeveral thing not eaſily to be ſeparated, whereas each diamond was diſtinct: and it ought to have been brought for ſo many diamonds. But the court thought there was no difference, and affirmed the judgment. And afterwards on error in Parliament it was likewiſe affirmed *ex parte*, I declining to argue it.

(1) *Vide* 1 *Com. Dig. Action upon the Caſe upon Trover*, (G. 2.) (G. 3.) 317. 1 *Ld. Raym.* 191.

Dominus Rex *verſ.* Malland.

Where there is no appropriation of a ſtatute penalty, it is a debt to the crown, and ſuable for in a court of revenue, and not by indictment.
Fitz. 47.
2 Seſſ. Ca. p. 12. No. 19.
1 Barn. B. R. 108. S. C.

INDICTMENT on the ſtatute of the late King, 12 *Geo.* 1. *c.* 35. for burning place bricks and ſtock bricks together. And on demurrer it was objected by Mr. *Fazakerley*, that in this particular inſtance, though a penalty of 20 *s. per* thouſand is given, yet there is no appropriation of it, or any method preſcribed in which it ſhall be recovered, though there is as to all the reſt. And upon looking into the act, it appeared this offence was omitted out of the clauſe, which gave the bricklayers

com-

company power to sue for the penalties; and therefore the court held, that the 20*s*. *per* thousand was in the nature of a debt to the crown, where the unappropriated penalty would go, and was suable for in a court of revenue, and not by indictment. Though *Strange* cited 1 *Mod*. 34. 1 *Vent*. 63. and insisted, that the 20*s*. ought to be the measure of the fine upon the indictment (1). *Judicium pro def'*.

(1) *Castle's* case, *Cro. Jac*. 643. *Rex* v. *Wright*, 1 *Burr*. 543. *Rex* v. *Pensax*, 1 *Barnard. B. R*. 127. 2 *Seff. Ca*. 224. *Rex* v. *Robinson*, 2 *Burr*. 803. In *Rex* v. *Boyal*, *ib*. 834. *Rex* v. *Harris*, 4 *Term Rep*. 205. 2 *H. H. P. C*. 171. 2 *Hawk. P. C. c*. 23. *sect*. 4. *p*. 301.

Borough of Christchurch.

UPON a motion for an information in nature of a *quo warranto* against the common freemen; it was held, that they need not be qualified by taking the test, for they do not exercise any office relating to the government of the town, and an information was denied.

Who ought to take the test. Fitzg. 47. S. C.

Dominus Rex *verſ*. Woodham.

UPON a motion for an information against the defendant, who was a justice of peace; it was held, that a person in execution in *B. R*. may be there charged criminally by a justice of peace's warrant. But that no such justice can take a prisoner of this court out of the custody of the court, and send him to the county gaol.

Justices of peace cannot commit one in *B. R*. to the county gaol.

Field *verſ*. Curtis. *[829]

IT was held, that no release could make the bankrupt a wit- to prove his own act of bankruptcy (1).

Bankrupt cannot prove an act of bankruptcy.

(1) *Ewens* v. *Gold*, *H*. 8 *Geo*. 2. *Per Hardwicke* C. J. *Bull. L. N. P*. 40. S. P. *Et vide Bateman* v. *Bailey*, 5 *Term Rep*. 512. and that he is not admissible to prove any fact necessary to support the commission. *Chapman* v. *Gardner*, in *C. B. H. Black*. 279. But the confession or declaration of the bankrupt made prior to the taking out the commission, that he did a particular act from such a motive as either constitutes it an act of bankruptcy in itself, or makes

makes it evidence of one, may, if made without collusion, be given in evidence where such particular act is proved. *Martin* v. *Eyloe*, *ante* 809. But this evidence seems not allowable unless it is concomitant with such facts. *Ambrose* v. *Clendon*, coram *Hardwicke* C. J. *Cas. temp. Hard.* 287.

Coleman *vers.* Sayer.

At Guildhall coram Raymond *C. J.*

Within what time a bill must be tendered. 1 Barn. B. R. 303. S. C.

A Bill was drawn payable at six days sight, and presented and accepted 8th of *February*, which made it payable the 14th, and the three days of grace brought it to the 17th, which was a *Saturday*, and the acceptor stopt payment on the *Tuesday* following, before which the bill was not tendered. And upon this evidence it was left to the jury, who were of opinion, that the drawer was discharged at the end of the three days of grace (1).

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(1) *Vide East India Company* v. *Chitty*, *post.* 1175.

Easter Term

2 Georgii 2 Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Francis Page, *Knt.*
James Reynolds, *Esq*;
Sir Edmund Probyn, *Knt.*
} *Justices.*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq*; *Solicitor General.*

Goodright *vers.* Hart et ux'.

No relief against a tenant's refusing to appear and make defence in ejectment.

1 Barn. B. R. 128. 146. 150. S. C.

THE defendant as daughter and heir of the late Admiral *Hosier* brought an ejectment, and recovered, and was put into possession: the other side brought an ejectment, and *Hart* and his wife obtained a rule to be made defendants with the tenants in possession, and entred their appearance: but the tenants having been practised upon, refused to appear or make any defence; upon which judgment was signed against the casual ejector, after a trial at bar had been granted; and a writ of possession was taken out, and possession delivered. *Hart* and his wife, the landlords, moved to set it aside, insisting that the only reason for making the landlord a defendant was to secure a trial in all events, and to prevent the tenant from betraying the possession. But the court refused to set aside the judgment, saying that the rule was only, that the landlord should be made a defendant *una cum* the tenants in possession; and therefore if they would not stand the suit, the landlord could not be let in. *Quære tamen*, for this is giving tenants much too great a power, and

and makes them absolute masters of the estate, and to choose their own landlords (1). See 11 *Geo.* 2. *c.* 19. § 13.

The court refusing to relieve the landlord, he went down into the country, and prevailed with the tenants, on giving them security to attorn to him; and then the plaintiff in ejectment came and complained to the court, and moved for a new writ of possession. But the court refused to relieve him, there having been a regular execution of the first writ; and said the distinction was, that if immediately after the writ had been executed, the tenants had attorned; there should have been a new writ. But not where the possession had continued as delivered for above a month, as it had in this case.

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(1) *Fairdaim ex dem' Fowler* v. *Shamtitle*, 3 *Burr.* 1301. 1303. Where the law of this case is doubted of, independant of the 11 *Geo.* 2. *c.* 19. and it is said that that act *by which all persons may defend without the tenant in possession, who might before have defended with him*, was drawn and introduced into parliament by Sir *John Strange*, *ib.* 1292.

Dominus Rex *vers.* Inhabitantes de Norton in Com' Salop'.

Appeal must be to the next sessions after removal, not date of the order.

MR. *Abney* excepted to an order of sessions for discharging an order of removal, because the justices' order was dated the 21st of *June*, and the sessions' order was not till *Michaelmas* sessions following, so that *Midsummer* sessions intervened.

To this it was answered, that by the express words of the statute the appeal is to be the next sessions after the parties find themselves aggrieved, which is not till the removal: and for ought appears, *Michaelmas* sessions might be the next sessions after the grievance. And so it was held in the case of the parishes of (*a*) *Milbrook* and *St. John's* in *Southampton*, *Mich.* 1 *Geo.* 1. in *B. R.* To which the court agreed, and the sessions' order was affirmed.

(*a*) Cases of Sett. and Rem. pl. 88. p. 66.

Between the Parishes of St. Michael Coslany in Norwich *and* St. Matthew's in Ipswich.

If a son grown up does not remove with his father, he gains no settlement in the last place his father lived in. 1 Barn. B. R. 108. 157. Andr. 380. 2 Sess. Ca. p. 154. No. 129. 2 Bott by Const 44. pl. 71. S. C. more full.

UPON an order of sessions the case was specially stated, on a removal of *Edmund Williams* and *Amy* his wife, and *Edmund*, *Solomon* and *Amy*, their children, from *St. Michael's* to

St.

St. Matthew's: that Edmund Williams the elder, the father of *Edmund Williams* removed, was settled at *Shipton Mallet*, and afterwards removed to *Bruton*, where he continued twenty years, and had *Edmund* the son born there, whom he bred up in his own trade till nineteen years old, when he left his father and came to *Norwich*, and married, and had the three children. That since the birth of the children old *Edmund* the grandfather gained a settlement in *Ipswich*. to which the two justices removed the family. But the sessions being of opinion, their settlement was not at *Ipswich*, discharged the order.

Et per cur', The order of sessions is right. For there is no colour to say the son and his family were settled at *Ipswich*. where they never were; and this is exactly the same case as that of *Eastwoodhay* and *Westwoodhay*. *Ante* 438. (1) [832]

But then an exception was taken to the order of sessions, that it is said to be made at a sessions held by adjournment such a day; and does not shew that the sessions commenced within the time prescribed by the act: it should have been *ad sessionem inchoatam* such a day, and held by adjournment after. And for this fault the order of sessions was quashed. *Strange pro Ipswich* (2).

Where an order is made at an adjourned sessions, it must appear the sessions began in time.

(1) *Bugden* v. *Ampthill*, Burr. S. C. 270. S. P. See also upon this subject *Rex* v. *Walpole St. Peters*, Burr. S. C. 638. *Rex* v. *Offchurch*, 3 *Term Rep*. 114. *Rex* v. *Witton cum Twambrooke*, ib. 355. *Rex* v. *Collingbourn Ducis*, 4 *Term Rep*. 199.

(2) *Rex* v. *Harrowby*, Burr. S. C. 102. *Rex* v. *Heptonstall*, ib. 88. S. P.

The Case of Schriven and Turner.

A *Mandamus* was granted to the court of aldermen in *London*, to restore them to the office of yeoman of the wood-wharf, on an affidavit of its being an ancient office and a freehold.

Mandamus for yeoman of the wood-wharf. 1 Term Rep. 404. 3 Term Rep. 652.

Bowles *vers.* Bridges and Markwick.

COVENANT on a deed dated 31 *August* 1720, whereby in consideration of 420*l*. paid by the plaintiff to the defendants, they covenanted, that they or one of them, on three

What is a sufficient tender (1).

(1) See *Thornton* v. *Moulton*, ante 533. *Blackwell* v. *Nash*, ante 535.

days notice in writing, to be left at the houfe of the defendant *Bridges* any time in a year, would accept, or caufe to be accepted, 2000 *l.* *South-fea* ftock, and all additions, and dividends, and pay for the fame on transfer thereof 12,000 *l.* with a provifo, that if the plaintiff fhould fubfcribe in the 20 *per cent.* fubfcription propofed to be taken in, and pay what is requifite to the expiration of the contract; the defendants fhould pay the fame over and above the 12,000 *l.* but if the plaintiff did not tender the ftock and dividends, then the agreement was to be void, and the defendants were to retain the 420 *l.* Then the plaintiff avers, that the company did not take in any ftock fubfcription; and although on 16 *Auguft* 1721, he gave notice in writing at the houfe of *Bridges*, that on the 19th of *Auguft* he would transfer the ftock and dividends, *ac licet* he was ready at the *South-fea-houfe* where the books were kept, and offered to transfer according to notice; yet the defendants, or either of them, did not accept the ftock, or pay the 12,000 *l.* but refufed, and ftill do refufe fo to do. *Dem' inde, et pro caufa,* that it does not appear what dividends or profits were made and tendered.

[833] And *Reeve pro defendente* argued, that the declaration was ill on that account, for he ought to have fhewn what they were, that the court might fee he made a tender of all. 2. The ufual hours of transferring ftock are not fhewn, fo it does not appear he was there the laft inftant of time, as he ought to be according to the cafe of *Lancafhire* v. *Killingworth*, *Salk.* 623.

Bootle contra. The dividends and profits are known and certain, and the defendants had the fame opportunity to know what they were as the plaintiff had. 2 *Cro.* 171. As to the fecond exception, he agreed that if it refted only on a tender, the declaration would be ill; but here he faid there was an actual refufal, and that is enough, be it at any time of the day: and a great difference there was between a tender and refufal, and a tender and non-acceptance. 1 *Inft.* 206. *b.* 5 *Co.* 114. (2). *Sed per curiam,* The refufal is not laid as an act done by the defendants, but only as a conclufion the plaintiff draws from the premiffes: it is not faid to be *adtunc et ibidem,* fo that for any thing appears it might be at another time and place: and the plaintiff muft precifely intitle himfelf to the action. And as to

(2) *Vide Jones* v. *Barkley*, *Doug.* 694. The cafes cited in *Blackwell* v. *Nafh*, *ante* 535. But where one party is not prevented by the other from making a compleat tender, he muft fhew one. *Vide Auftyn* v. *Jervoife*, *Hob.* 69. 77. *Anon.* 2 *Roll. Rep.* 238. *Lancafhire* v. *Killingworth*, 1 *Ld. Raym.* 687.

the

the first objection, the declaration is certainly informal, and it is shewn for cause of demurrer. The plaintiff discontinued on payment of costs.

Jones *vers.* Mason.

At Nisi Prius *in* Middlesex, coram Raymond, *Chief Justice.*

JOHN *Ward* of *Hackney* (who had been convicted for forgery) was a subscribing witness to a bond; and on producing the record of his conviction, the plaintiff was allowed to prove his hand as if dead (1).

If the witness to a deed becomes infamous, he is to be considered as dead.
1 Barn. B. R. 104. 116.

(1) *Godfrey* v. *Norris*, *ante* 34. *Swire* v. *Bell*, 5 *Term Rep.* 371.

Evans *vers.* Thomas.

THE roll of the judgment was carried in, in *Trinity* 1720, and docquetted; but before filed was mislaid and lost. And *Strange* moved for leave to file a new roll, the defendant being dead, and the executrix consenting: and cited *King qui tam* v. *Bolton*, *ante* 117. and *Needham* v. *Grano* (*a*). And after a rule to shew cause, it was ordered accordingly, for there being a docquet, it could be no deceit upon purchasers (1).

New roll ordered to be filed the former being lost.
1 Barn. B. R. 160. 164. S. C.
(*a*) Ante 141.

(1) *Post.* 1007. 1264. 2 *Kely.* 106.

Dominus Rex *vers.* Wynd et al'.

[834]

INDICTMENT for a riot, and riotously taking away two water-engines; after verdict *pro rege* it was moved in arrest of judgment, that there was no *vi et armis*. 2 *Keb.* 133. 1 *Vent.* 265. *Sed per curiam*, The *riotose ceperunt*, *fregerunt et prostraverunt*, implies a force, and the indictment is well enough. *Vide* 37 *Hen.* 8. *c.* 8. *Cro. Car.* 345. 472. 2 *Lev.* 221. *Sti.* 12. *Judicium pro Rege.*

Vi et armis is implied in a riot, 2 Sess. Ca. p. 13. No. 20.
Barnard. B. R. 158. 162. Fitz. 6:. S. C. all more full.
Vide 1 Hawk. P. C. ch. 64. s. 44. p. 287. 2 Hawk. P. C. c. 25. s. 91. 344.

Goodtitle *vers.* Walton.

AFTER verdict *pro quer'* in ejectment, the judgment was arrested, because it was for a messuage, a garden and a *tenement*, and entire damages; whereas an ejectment *de uno tenemento* will not lie (1). *Strange pro quer'*.

Ejectment lies not for a tenement.
1 Barn. B. R. 155. 164. S. C.

(1) *Wood* v. *Payne*, *Cro. Eliz.* *Pop.* 197. *Rochester* v *Rickhouse*, *ib.* 186. 3 *Leon.* 228. S. C. *Anon.* 203. *Cro. Jac.* 124. 455. *Cro.* *Car.*

Car. 471. 553. *Yelv.* 118. *Noy.* 186. *Vide* also *Hexham* v. *Coniers*, 3 *Mod.* 238. *Birbury* v. *Yeomans*, 1 *Sid.* 295. 2 *Keb.* 82. *Copleston* v. *Piper*, 1 *Ld. Raym.* 191. *Makepeace* v. *Hopwood*, *Barnes* 173. *Goodright* v. *Flood*, 3 *Wilf.* 28. S. P. *Sed vide Cottingham* v. *King*, 1 *Burr.* 621. *Connor* v. *West*, 5 *Burr.* 2673. *Massey* v. *Rice*, *Cowp.* 350. in which the court inclined against, and *Doe ex dem. Stewart* v. *Denton*, 1 *Term Rep.* 11. in which they over-ruled the objection.

Dominus Rex *verf.* Woolfton.

To write against Christianity in *general* is punishable in the temporal courts at common law (1). Fitzg. 64. S. C. more full. Ante 789.

HE was convicted on four informations for his blafphemous difcourfes on the miracles of our Saviour. And attempting to move in arreft of judgment, the court declared they would not fuffer it to be debated, whether to write againft Chriftianity in general was not an offence punifhable in the temporal courts at common law: it having been fettled fo to be in *Taylor's* cafe in 1 *Vent.* 293. 3 *Keb.* 607. 621. and in the cafe of *The King* v. *Hall*, *ante* 416. They defired it might be taken notice of, that they laid their ftrefs upon the word *general*, and did not intend to include difputes between learned men upon particular controverted points. The next term he was brought up, and fined 25*l.* for each of his four difcourfes, to fuffer a year's imprifonment, and to enter into a recognizance for his good behaviour during his life, himfelf in 3000*l.* and 2000*l.* by others.

(1) *Rex* v. *Annet*, *H.* 2 *Geo.* 3. 3 *Burn's Ecc. Law* 203. S. P.

Rejindoz *verf.* Randolph.

Of cofts on quafhing writs of error.

THE writ of error being returnable before judgment given, was quafhed, and the plaintiff in error paid cofts; it appearing to be his fault in ufing the writ after he knew it was fpun out by his own motion in arreft of judgment. The court faid they would have made the defendant in error pay the cofts, if it had appeared that he entered continuances on purpofe to defeat the writ of error (1).

(1) *Vide Gould* v. *Coulthurft*, *ante* 139. *Vice* v. *Burton*, *poft.* 891. *Wilfon* v. *Ingoldfby*, 2 *Ld. Raym.* 1179. *Canning* v. *Wright*, *ib.* 1531. But in almoft all cafes the writ *is fued out* before judgment figned, becaufe otherwife execution would iffue inftantly." *Per Buller* J. *Jaques* v. *Nixon*, 1 *Term Rep.* 280.

Trinity Term

3 Georgii 2 Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Francis Page, *Knt.*
James Reynolds, *Esq*; } *Justices.*
Sir Edmund Probyn, *Knt.*

Sir Philip Yorke, *Knt. Attorney General.*
Charles Talbot, *Esq*; *Solicitor General.*

Dominus Rex *vers.* Lewis.

STRANGE moved for a *mandamus* to three justices of peace in *Brecon*, to take security on articles of the peace exhibited against the defendant in *B. R.* and produced an affidavit of his being seventy years of age, and unable to travel; and cited *Seymour's* case, *Mich.* 6 *Ann.* and it was granted in this case.

Mandamus to take security on articles. 2 Sess. Ca. p. 69. No. 72. 1 Barn. B. R. 166. Fitz. 85. S. C.

N. B. *Trin' sequen'*, on affidavit of having kept the peace, and being unable to come up, the recognizance was discharged.

Worral *vers.* Bent et al'.

AFTER verdict in ejectment on two demises, where the second was laid to be of other lands, it was objected on error, that the judgment is only to recover *terminum suum* in the singular number, so uncertain which. *Sed per curiam*, It is *de et in tenementis pred'*, which *reddendo singula singulis* is well enough, for there is but one term in each part of the premisses

Where there are two demises of different lands, judgment to recover his term, in the singular number, is sufficient. Fitzg. 83. S. C.

misses (1). Judgment affirmed. *Strange pro defendente in errore.*

(1) *Fisher* v. *Hughes*, *post.* 908. *Morris* v. *Barry*, *post.* 1180.

Rochtschilt *verf.* Leibman.

The statute of Limitations will not run against action on bill of exchange where plaintiff is beyond sea (1).

THE plaintiff brought an action upon a bill of exchange, to which the defendant pleaded the statute of Limitations, and the plaintiff replied himself beyond sea, to which the defendant demurred. And *Reeve* objected, that no actions on the case are within the proviso, but actions on the case for words: and cited *Cro. Car.* 245. *Show.* 98.

Parker contra, Where the words of a statute are general, they are to be understood in that sense. 10 *Co.* 101. It is impossible to think so trifling an action as for words should be saved, and not those which are founded on a contract; besides, it has been determined that the proviso extends to this case. 2 *Saund.* 120. 2 *Mod.* 71. *Lutw.* 244. *Et per curiam*, Judgment for the plaintiff.

(1) *Vide Stritborst* v. *Greene*, 3 *Wilf.* 145. But in an action upon a bill of exchange by the payees, where one plaintiff had been abroad, and the other in *England*, it was held that the action must be brought with six years after the cause of action arose. *Perry* v. *Jackson*, 4 *Term Rep.* 516.

Dominus Rex *verf.* Boyles.

Quo warranto lies for setting up a new office. L. Raym. 1559. Fitz. 82. S. C.

INFORMATION *in natura de quo warranto* against the defendant to shew by what authority he claimed to be bailiff of the ville of *Southwold* in the county of *Suffolk*. And on demurrer it was objected by *Hussey*, that it doth not appear *Southwold* is any corporation, either by charter or prescription, so as to make this a usurpation upon the crown; it may be only a private office, as bailiff of a manor, for a ville is not a borough, and *ballivus* is but a servant. 2 *Cro.* 177. *Sed per curiam*, It is said to be an ancient town, and that this is a publick office, an office of great trust and pre-eminence within the town, *tangens regimen et gubernationem villæ prædict'*, *et administrationem publicæ justitiæ infra eandem villam*, all which is confessed by the demurrer. And certainly the setting up such an office is a usurpation. Suppose a man should set up to preside at *Islington*

as a publick officer, and have *insignia* carried before him, is he not to be punished for this, and have you any other way to come at him but by such an information? It is never laid otherwise than that it is a publick office relating to the administration of publick justice (1). *Judicium pro rege.*

(1) *Rex* v. *Nicholson*, *ante* 299. and *vide Rex* v. *Sir Thomas Reynale*, *post.* 1161. and the note, and *Rex* v. *William Wallis*, 5 *Term Rep.* 375.

Hetherington un', &c. *vers.* Lowth. [837]

THE defendant pleaded the privilege of *C. B.* and the plaintiff moved to set it aside, he suing as an attorney of *B. R.* upon the foot of privilege taking away privilege (1). But the court said, that was a point of law which they would not determine on a motion, but put the plaintiff to demur to it. *Strange pro quer'.* Plea, refused to be set aside. 1 Barn. B. R. 182. 228. S. C.

N. B. This was moved again next term by *Reeve*, and we produced the declaration, by which it appeared the plaintiff sued by original, which was held a waiver of his privilege.

(1) *Launder* v. *Cockayne*, *Barnes* 44. Held in *C. B.* that it shall. *Danser* v. *Berryman*, 2 *Black.* 1325. *Guy* v. *Reynell*, 2 *Brownl.* 266. In *C. B.* S. P. *Lunn* v. *Ascough*, *Barnes* 43. *contra.*

Rutter *vers.* Redstone.

AFTER error in the Exchequer Chamber the transcript was brought back and amended in *B. R.* by the original record. And it was held necessary to make the amendment here (1), as this differs from the case of a writ of error from *C. B.* because the Common Pleas sends up the very record, and the King's Bench sends only a transcript. *B. R.* does not send the record to Exchequer Chamber.

(1) See *Tully* v. *Sparkes*, *post.* 869. acc.

Higgs *verſ.* Evans.

Will not quaſh error though appears 29 years after judgment.

MR. *Ketelbey* moved to quaſh the writ of error, becauſe it appeared there was twenty-nine years between the judgment and the bringing the writ, whereas the party is reſtrained to twenty years. *Per curiam*, So he is, but this will be to deprive him of the benefit of replying the exceptions in the ſtatute. *Nil cap. per motionem. Strange pro quer' in errore.*

Dominus Rex *verſ.* Archiep' Ardmagh et Nathaniel' Whaley, clericum.

Intr. Trin. 13 Geo. 1. rot. 143.

In *quare impedit* by the King for the next turn of a living void by promotion, defendant pleads that the crown preſented *D.* who is ſince dead, and that he himſelf is now preſented, &c. *parſon imparſonee*, with a traverſe that the church is ſtill vacant by the promotion; this is a confeſſion and avoidance, and the traverſe being therefore bad, it may be paſſed over, and iſſue taken upon the avoidance. Where the declaration having ſet forth that *B.* the late Archbiſhop was ſeiſed as of fee in right of his Archbiſhoprick of the advowſon of *A.* &c. and the Archbiſhop by his plea admits this ſeiſin and the vacancy by promotion as alleged, but pleads further that the crown by patent granted to *D.* the deanery of *A.* with all its rights, members, &c. by virtue whereof he was poſſeſſed of the church of *A.* as a member of the deanery, &c. this is ill, as it neither ſhews a preſentation, or that the church is a member of the deanery.

ERROR of a judgment in *B. R. in Hibernia* on a *quare impedit* brought by the crown againſt the Archbiſhop of *Ardmagh* and *Nathaniel Whaley*, clerk.

The declaration ſets forth, that *Michael Boyle*, late Archbiſhop of *Ardmagh* was ſeiſed as of fee, in right of his Archbiſhoprick, of the advowſon of the church of *Ardmagh*, and being ſo ſeiſed collated *Bartholomew Vigors*, who was admitted, and afterwards made biſhop of *Leghlin* and *Fernes* by King *William* and Queen *Mary*, whereby it belonged to the crown to preſent upon ſuch promotion: that during the vacancy Queen *Mary*, and then King *William*, and then Queen *Anne*, died, and ſo it belonged to King *George* the Firſt to preſent, but the Archbiſhop and *Whaley* obſtruct.

The Archbiſhop prays *oyer* of the writ, and then pleads, that true it is that *Michael Boyle* was ſeiſed in right of his Archbiſhoprick, and that the church became vacant by the promotion of *Vigors*, *unde* it belonged to the crown to preſent for that turn: but then he ſays, that King *William* and Queen *Mary* by letters patent 23 *February*, 3d of their reign, granted to *Peter Drelincourt* the deanery of *Ardmagh*, with all its rights, members and appurtenances, by virtue whereof he was poſſeſſed of the church of *Ardmagh* as a member of the deanery, and enjoyed the ſame to his death: that *Michael Boyle* died, and *Narciſſus Marſh* ſucceeded him, and became ſeiſed of the advowſon, and upon his death it came to *Thomas Lindſey*, in whoſe time *Vigors* the pro-

motee died: that *Drelincourt* is since dead; by which the right of presenting was in *Lindesay*, who 5 *May* 1722, presented the other defendant *Whaley*, who is now incumbent.

The defendant *Whaley* likewise prays *oyer* of the writ; and then pleads, that he is parson imparsonee of the collation of the late Archbishop: that the church did become vacant by the promotion of *Vigors*, and that the crown presented *Drelincourt*, who was admitted, instituted, and inducted: then he deduces the title from *Boyle* to *Lindesay*, as in the Archbishop's plea, with the death of *Vigors*; and says, that *Drelincourt* died 8 *March* 1721, and *Lindesay* 5 *May* following presented him, upon which he was put into possession of the living before bringing the King's writ; and concludes with a traverse, that the church is still vacant by the promotion of *Vigors*, as is alleged in the declaration.

The Attorney General as to the Archbishop's plea demurs; and shews for cause, that it is not averred in the plea, that the church of *Ardmagh* was a member of the deanery, or enjoyed as such by *Vigors*, or presented to as such by King *William* and Queen *Mary*. And the Archbishop joins in demurrer.

As to *Whaley*'s plea, the Attorney replies, that King *William* and Queen *Mary* did not present *Drelincourt* to the church of *Ardmagh*, and concludes to the country.

To this replication *Whaley* demurs generally, and after a joinder in demurrer, and several continuances, there is judgment in *B. R.* in *Hibernia*, that the Archbishop's plea is a good bar, and that the Attorney's replication to *Whaley*'s plea is insufficient; *ideo defendentes eant inde sine die*, &c. [839]

Of this judgment a writ of error is brought, the general errors assigned, and *in nullo est erratum* is pleaded.

Strange pro rege argued, that the court below has erred in both instances. 1. In giving judgment, that the Archbishop's plea is a good bar; and 2. In adjudging that the Attorney General's replication to *Whaley*'s plea is insufficient.

As to the first point, I need only to enumerate the causes which are specially assigned in the demurrer: and it is inconsistent to say the living belonged to the Archbishoprick, and at the same time insist that it passed by the King's grant of the deanery. But then it will be rightly urged, that the King can have no writ to the bishop, unless he overthrows both parts of

the judgment: and therefore I ſhall endeavour to ſhew, that the judgment in favour of *Whaley*'s plea, and againſt the Attorney's replication, is as erroneous as the other.

And upon this the principal queſtion will be, whether the traverſe at the end of *Whaley*'s plea be ſo material, that the Attorney General could not paſs it over, and take iſſue on the preſentation of *Drelincourt*, as alledged in the plea. And that will depend on the conſideration whether the plea without the traverſe had ſufficiently confeſſed and avoided the title of the crown, as ſet forth in the declaration. For if it had, then the traverſe will be improper and immaterial: if it had not, then a traverſe might be neceſſary, and if it was well taken, the Attorney General could not paſs it over.

But I take it the plea of Mr. *Whaley* is a full confeſſion and avoidance. The title ſet up by the crown is a prerogative title (not now to be diſputed) to preſent upon the promotion of *Bartholomew Vigors* to the biſhoprick of *Leghlin* and *Ferns*. The ſubſtance of *Whaley*'s plea is, firſt a confeſſion that there is ſuch a prerogative, and that *Vigors* was ſo promoted; but then to avoid the King's recovering in this ſuit, he ſays, that the crown has had its turn already by the preſentation of *Drelincourt*. By this plea all matters in diſpute, except the preſentation of *Drelincourt*, are agreed. The vacancy by promotion is agreed; the prerogative is agreed; and the only thing remaining in contro-
[840] verſy is, whether the crown has exerciſed the prerogative in this inſtance. To that the Attorney General very properly anſwers, that the crown has not had its turn, for that they never preſented *Drelincourt*: and if the cauſe had gone to trial upon that iſſue, it would have been tried upon the moſt material point, nay the only point remaining in diſpute. As therefore this plea without the traverſe is a full confeſſion and avoidance, it would be miſpending time to cite caſes to prove that where I confeſs and avoid, I ought not to traverſe: the confeſſion and avoidance is a full defence of itſelf, and to add a traverſe is but to make the plea repugnant.

Yel. 151, 221. Lut. 156. 6 Co. 24.

There remains only one thing to be added upon this head, and that is, that as the traverſe was immaterial, it was in the election of the Attorney General, either to demur upon that account, or to paſs it over, and offer a new traverſe upon the matter of *Drelincourt*'s being preſented by the crown. For this there was a caſe in *B. R. Mich.* 5 *Geo. King qui tam* v. *Bolton*. There the plaintiff declared in prohibition, that he was duly elected a common council man of *London*, and the defendant had petitioned againſt him in the court of common council, which had no ju-

Ante 117. and the note.

riſdiction

riſdiction to examine into the validity of the election, the cognizance whereof belonged to the court of mayor and aldermen: the defendant in his plea ſtates his own election, and that he petitioned againſt the plaintiff in the common council *prout ei bene licuit*, and then concludes with a traverſe, that the juriſdiction is in the court of mayor and aldermen: the plaintiff in reply paſſes over this traverſe, and offers another iſſue on the point whether the common council had the juriſdiction: and on demurrer it was reſolved by the whole court, that the true point of the prohibition being, whether the court to be prohibited had juriſdiction or not; it was improper for the defendant to go off from that, and offer an iſſue as to the juriſdiction of the mayor and aldermen; and that though the plaintiff might ſafely have demurred, for the immateriality of the traverſe, yet he was not bound to do it, but was at liberty to take a new traverſe, in order to bring the merits of the caſe in iſſue: purſuant to which reſolution judgment was given for the plaintiff in prohibition, and upon error in Parliament that judgment was affirmed.

But whatever ſhould be the opinion of the court upon the queſtion, whether a traverſe could be added, yet I apprehend the traverſe here taken by *Whaley* is an ill traverſe, and we being upon a demurrer muſt go back to the firſt fault, which is in the defendant's plea. The plea has ſtated the fact, and whether that fact amounts to a plenarty againſt the crown is a conſequence of law ariſing upon that fact. The traverſe here is, that the church is not now vacant, which being a conſequence of law, ought not to be traverſed (1). 11 *Co.* 10. *b.* *Plow.* 231. *a.* 496. *a.* *Paſ.* [841]
1 *Geo.* *Rex* v. *Blagdon.* In an information in nature of a *quo warranto*, the defendant made title under the conſtitution of *Honiton*, and then traverſed the uſurpation: the Attorney General, without taking any notice of the title, joined iſſue upon the traverſe; and it was held to be ill, becauſe the uſer being admitted by the defendant's making title, the uſurpation was a matter of law not to be ſent to a jury.

But then it was argued below (and will be inſiſted on here) that if the Attorney might take a new traverſe, yet his preſent traverſe is ill, becauſe it ties up the defendant to prove a preſentation, when inſtitution and induction is ſufficient.

To this I anſwer: that the law is not ſo, there muſt be a preſentation to make the church full againſt any common perſon who

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(1) *Vide the Grocers' Company againſt the Archbiſhop of Canterbury and Backhouſe*, 2 *Black.* 776. 3 *Wilſ.* 214, *to* 324. S. C.

has the right, and much more against the crown. So is 6 *Co.* 50. *a.* 1 *Leon.* 226. Here the only act pleaded to be done by the crown is the presentation; the institution and induction being the acts of others in consequence of that act; the traverse therefore was proper, in denying the only act alledged to be done by the crown, and the only act that could create a plenarty against it.

Where the crown has a title to present on promoting the incumbent to a bishoprick, it is not necessary to be done during the life of the promotee. But the crown loses its turn if there has been presentation of another by some one else, and such presentee dies.

Another objection was, that it appears upon the record, that *Vigors* the promotee died before the *quare impedit* brought, and therefore (say they) this is not a case within the reason on which the prerogative is founded, (*viz.*) that it is but changing one life for another. If this objection had any authority in law to support it, it might be reasonable to go into the consideration of it: but as the life of the promotee was never thought necessary to be averred, it is plain the law was taken to be otherwise. The patron, the bishop, and the metropolitan may lapse, *sed nullum tempus occurrit regi*; and the case in *Ow.* 2. which is an exception to the rule, does not come up to this case; for there it is put of a lessee *pur auter vie* being attainted of treason, where no doubt the King must present during the life of *cestuy que vie*, because his title continues no longer.

For these reasons I apprehend the replication is good, and the judgment in both instances, on the Archbishop's plea, and the Attorney's replication to *Whaley*'s plea, is erroneous, and ought to be reversed, and a writ awarded to admit his Majesty's clerk.

Darnall Serjeant *contra*. I shall insist that upon the whole record there does not appear any title in the crown to present at the time of bringing the *quare impedit*. Here are thirty years after
[842] the promotion, which are not accounted for; and though I am not to dispute whether there is such a prerogative, yet surely the crown is bound to exercise it in a reasonable time. The reason given for the prerogative is, that it is but changing one life for another, and the patron has an equal chance: but if the crown can stay till the person promoted is dead, then a new life is put upon the patron, and so far he is prejudiced by the promotion. In many cases *tempus occurrit regi*. *Regist.* 31. *Cro. El.* 44. *Ow.* 2. *Cro. Jac.* 216. *Cro. El.* 119. 1 *Bulst.* 26.

Against a rightful patron institution and induction is not enough, but here the King is not rightful patron, he has not the permanent, only a transitory right, as in the case of lapse.

As to the traverse in the plea: the vacancy is the foundation of the King's bringing the *quare impedit*: and therefore it is traversing

versing the most material part of the declaration. *Cro. Car.* 61. And if so, then the Attorney General could not pass it over, and take a new traverse. *Hob.* 318. *Lutw.* 1560. *Hutt.* 96.

Per curiam, It is impossible to maintain the primate's plea, which neither shews a presentation, nor that the church was a member of the deanery: therefore all the facts alleged in that plea are to be laid out of the case, not being admitted by the demurrer, because ill pleaded, 5 Com. Dig. Pleader. (Q. 6.) 488.

As to *Whaley*'s plea; it is a full confession and avoidance without the traverse; which for that reason is immaterial, and might as such be passed over.

As to the length of time: there is no doubt but *tempus occurrit regi*, if there had been a presentation; for the King's is the next turn, and if he suffers another to present, and the incumbent dies; the turn of the crown will be as much gone, as it would be in case of any common grantee of the next avoidance: but upon this record we must take it, that the King comes before any presentation: and no case is cited to prove the crown is limitted in point of time. If it must be done in the life of the promotee, a declaration will not be good without averring his life, which was never done. In the case of simony the crown was not barred by ever so many presentations before the act of Parliament; and if the grantee of the next avoidance should come at one hundred years distance after the death of the incumbent, he must have his turn, if there has been no presentation all the while. If a common person had presented *Drelincourt*, he being dead, the crown would have lost its turn: but without a presentation it can be no plenarty against the person who has the right, which is the crown in this instance, though the advowson is in another, which cannot alter the case. 1 W. & M. st. 1. c. 16. [843]

We are all therefore of opinion, that the court below has erred in both instances, and therefore the judgment must be reversed *in toto*, and a writ awarded here (as it should have been below) to admit his Majesty's clerk.

Upon error in Parliament, the House of Lords were of opinion, that this being a civil suit of the crown, the writ of error was abated by the death of the King, and therefore reversed the judgment of reversal in *B. R.* And a new writ of error being now brought, and the same record returned, the court was not inclinable to suffer it to be spoke to, looking upon themselves only as a channel to convey the cause again to the House of Lords. But *Bootle* pressing to be heard as to a new point, objected

Where the King brings a writ of error in *quare impedit*, it abates by his death. 1 Com. Dig. Abatement. (H.) 38. 77.

jected that the traverse at the end of the incumbent's plea was material, because what went before could not in all events be a turn, since the presentee, for any thing that appears, might not subscribe the articles: and cited 5 *Co. Windsor's* case. *Winch.* 13. 2 *Cro.* 650. *Yelv.* 115. *Sed per curiam,* Then you are not parson imparsonee to be let in to controvert this, for you have not alleged a subscription of the articles; and it is as necessary in your plea as in the King's count, though the truth is it was never alleged in either.

Subscribing the articles need not be alledged in *quare impedi*, either in the declaration or plea.

As to the other points, the court stood to their former opinions, and reversed the judgment given in *Ireland*, and gave judgment for the King.

N. B. On a second writ of error in Parliament, all the Judges attended, and were unanimously of the same opinion with the Judges of *B. R.* notwithstanding which, the judgment of *B. R.* in *England* was reversed, and the judgment in *Ireland* set up again.

Dominus Rex *vers.* Hayes.

In an indictment a variance in the addition of the obligor was amended after special verdict, the record of *nisi prius* having been made up by defendant's clerk in court.

If a special verdict upon an indictment for three offences finds facts which prove the defendant guilty of two, and refer it to the opinion of the court whether he is guilty of the facts charged in the indictment, they will adjudge him guilty of these two, and not guilty of the rest. L. Raym. 1518. S. C. fuller and with two other points. 1 Barn. B. R. 31, 32, 48, 142, 167. S. C.

THE defendant was indicted for forgery of a bond: and upon the trial there appeared a variance in the addition of the obligor, upon which a special verdict was found, the Chief Justice doubting whether it was a variance or not, it being *peroch'* for *paroch'*: and after the verdict was drawn up, the prosecutor moved for leave to amend the *nisi prius* roll by the record of the indictment, which was right; and alleged, that the record of *nisi prius* had been made up by the clerk in court of the *defendant, who might be suspected to have made it wrong on purpose.

[*844] 1 Com. Dig. Amendment. (A.) 444.

The court seemed to think this was amendable at common law, there being something to amend by: but they said there was no occasion to give any opinion upon that, since they were warranted to amend it, as being a fault committed by the defendant, who ought not to take advantage of it.

On arguing a special verdict in a criminal case defendant need not be in court. Ante 767.

The variance being thus removed out of the case, the cause was put into the paper to be argued upon the special verdict; and the counsel for the defendant attempting to speak, it was insisted that the defendant ought to be in court, as upon motions in ar-

reſt of judgment. To which it was anſwered, that a motion in arreſt of judgment is after a verdict; whereas till this ſpecial verdict is argued and determined, the defendant is not to be looked upon as guilty: and the court thought this a reaſonable diſtinction, and ſuffered the defendant's counſel to go on.

And then it was argued, That it was an imperfect verdict. *Strange pro def.* The indictment is for three diſtinct facts: 1. For forging a bond; 2. for publiſhing *ſuch* bond ſo by him forged; and, 3. for publiſhing *a* bond, knowing it to be forged. To theſe three offences the defendant pleads Not guilty, and the jury were charged to inquire of the whole, and in their verdict they find, that he forged a bond in the words and figures following, and that he publiſhed the ſame; but they ſay nothing as to the third offence, but conclude, that if upon this evidence the court is of opinion he is guilty of the facts charged in the indictment, then they find him guilty; and if the court think him not guilty, they find accordingly.

Upon this ſtate of the caſe it was inſiſted on, that the jury ought to find all the iſſues with which they are charged; and ſince the evidence extended to facts only, they ſhould have found him Not guilty as to the third. 3 *Lev.* 55. Treſpaſs for taking a gown and manteau: it is found ſpecially, that the defendant took the gown for a tax, and ſaid nothing as to the manteau, and held a diſcontinuance. *Cro. Eliz.* 133. 2 *Roll. Abr.* 722. *pl.* 19. and 2 *Sid.* 85. it is ſaid, that in all ſpecial verdicts the Judges will not adjudge of any matter of fact but that which the jury declare to be true of their own finding. *Trials per Pais* 236. Here the court are ſpecially tied down, to ſay whether upon the evidence laid down before them the defendant is guilty of *all* the facts; and that they cannot ſay, becauſe there is no evidence as to one. *Co. Litt.* 227. *a.* A verdict that finds part of the iſſue, and nothing as to the reſt, is inſufficient for the whole: as in an information of intruſion into a meſſuage and one hundred acres of land, the jury find as to the land, and nothing as to the houſe, it is void for the whole. *Godb.* 57. 2 *Leon.* 194. *Hard.* 166. [845]

The court held, that as the verdict ſtood, they could not give judgment that the defendant was guilty of all the offences, the evidence only warranting them to adjudge him guilty of the two firſt, the laſt not being confined to the ſame bond; or if it was, yet every publication is a diſtinct offence. But then they thought themſelves not tied up by the ſpecial concluſion, but that the whole evidence being laid before them, they were to do what the jury ought to have done. And therefore they adjudged, that upon *The duty of the court on ſpecial verdict.*

upon the matter referred to them by the jury, it appeared to the court that the defendant was Guilty of the forgery and first publication, and Not guilty of the rest.

May move in arrest any time before judgment signed.

Judgment not having been signed, the court was of opinion, the defendant might move any thing in arrest of judgment. And it having been taken notice of by the counsel for the King, that the forgery was laid to be *contra formam statuti*, and the judgment prayed upon the statute; it was then objected by the counsel for the defendant, that all the proceedings against him were void, for that the *certiorari* and the *venire* and *distringas* were as if it had been an indictment at common law; and many precedents were cited, where the process always run, *de quibusdam transgressionibus et contemptibus contra formam statuti*. And indeed that distinction had been kept up in all the forms of the crown-office. But the court thought it not necessary, for a *certiorari* to remove all indictments will remove one for forgery on the statute; and the jury are summoned to try whether he is guilty of the offence whereof he is indicted, which is a sufficient warning to appear in the cause: and therefore they pronounced the judgment upon the statute, and he stood in the pillory at *Charing-Cross*, and had one ear cut off, and then was carried to the *King's Bench* to suffer a year's imprisonment; during which he moved for the liberty of the rules, which was denied, he being in execution (1).

A *certiorari* to remove an indictment need not describe whether the offence be laid *contra form. statut'*.

(1) *Vide* case of *Landen Jones*, *ante* 817.

Michaelmas Term

3 Georgii 2. Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Francis Page, *Knt.*
James Reynolds, Esq.
Sir Edmund Probyn, *Knt.*
} *Justices.*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq; Solicitor General.*

Hatton *vers.* Walker.

THE defendant concluded his plea with *unde petit judicium sed* (instead of *si*) the plaintiff *actionem manutenere debeat.* And on demurrer the plaintiff shewed it for cause, and the defendant joined in demurrer. And coming afterwards to amend by the draft under counsel's hand (1); it was objected, that the intent of requiring mistakes in point of form to be shewn for cause of demurrer, was to give the party an opportunity to amend before he proceeded any further: but if after notice of his fault he will be so hardy as to join in demurrer, he is not intitled to the favour of amending. And the court now strongly inclined against giving leave to amend; till *Parker* at another day cited *Cro. Car.* 144. and *Hil.* 8 *Ann.* in *B. R. Brownjohn* v. *Doyley*, where the avowry was amended by the draft under counsel's hand, after there had been a demurrer, and the cause made a *concilium*: upon the authority whereof they gave leave to amend in this case.

Amendment after a special demurrer.
1 Barn. B. R. 213, 220, S. C.
Post. 954.

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(1) *Anon.* Cases *B. R. Temp. Hardw.* 205.

Stephens *verf.* Haughton.

Difference between trefpafs and replevin as to avowries. 1 Barn. B. R. 128, 214. Fitzg. 108. S. C.

IN replevin the defendant avowed as bailiff of the dean and chapter of *Weftminfter* for an amercement at the court-leet, for making bread wanting weight, contrary to 8 *Ann. c.* 18. which gives the leet jurifdiction. And on demurrer it was held to be an ill avowry; becaufe it was not averred, that the defendant was guilty. And a difference was taken between replevin and trefpafs; that in trefpafs the conviction is fufficient to juftify the officer, who is only to excufe himfelf, whereas in replevin the defendant is an actor, and makes title for a return of the goods. *Carth.* 73. *Mo.* 75. *Cro. El.* 885. *Skinner* 587.

Amercements muft be by the court, and not by the jury. 5. Com. Dig. Pleader. (3 K. 27.) 768. 3 Com. Dig. Leet (O. 2.) 702.

Another objection was taken and allowed, that it appeared the amercement was by the jury, and not by the court, as it ought to be; and that there was no affeerement. 3 *Lev.* 19, 206. 8 *Co.* 38.

For thefe reafons the avowry was held ill, and the plaintiff had judgment.

Enys *verf.* Mohun.

Repleader awarded after an immaterial iffue. 1 Barn. B. R. 182, 220. S. C.

IN covenant the plaintiff declares on a leafe made to *Cofter*, which he lays to have come by affignment to the defendant. The defendant pleads, that *Cofter* did not affign to him: and after iffue joined, a repleader was awarded, it being an iffue joined on what is not alleged in the declaration; for that does not fay *Cofter* affigned to the defendant, but that it came by affignment, and there may be many *mefne* affignments: and the court held this to be an immaterial, and not barely an informal iffue, becaufe the fact found does not determine the right (1).

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(1) It appears by the report in *Barnardifton*, that this was a motion in arreft of judgment, a verdict being found for the plaintiff. "But that it is a rule never "to grant a repleader where the "iffue is found againft the party "tendering it." *Per Buller* J. in *Webfter* v. *Bannifter*, *Dougl.* 396. *Vide* 5 *Com. Dig.* Pleader (R. 18.) 511.

Edgeworth *verf.* Smaldridge.

THE executor proved the will in the prerogative court, and a legatee fues him in the arches, which is a court held within the diocefe of *London*, but belonging to the Archbifhop of *Canterbury*. The defendant moved for a prohibition, he living in *Hertfordfhire*, and therefore by the 23 *H.* 8. *c.* 9. ought not to be cited out of the diocefe, this not being within any of the exceptions in the ftatute. *Sed per curiam*, The general faving as to the probate of wills extends to this, which is a confequence of their having jurifdiction to cite a man out of the diocefe to prove a will; and if his living out of the diocefe in which the will was proved be an objection to fuing him there for a legacy, it will overthrow the jurifdiction of the fpiritual court as to legacies: the executor by proving the will in the Arches fubmits to the jurifdiction of that court: it is the arches, and not the prerogative court, where the will is to be proved; and it is proper the executor fhould be fued in the court where he muft render an account and get his difcharge (1).

Executor may be fued for a legacy in that court where he proves the will, though he does not live in that diocefe. Fitzg. 110. 1 Barn. B. R. 223. S. C.

[848]

(1) S. P. *Anon.* 1 *Vent.* 233. *Per Holt* C. J. *Machin* v. *Molton*, 1 *Lord Raymond*, 253. 12 *Mod.* 259. *Sed vide Hughes*'s cafe, *Godb.* 214. Where the executors of a man who had lived in *Somerfetfhire*, were fued in the Arches for a legacy and a prohibition granted, and faid *per Warburton* J. to have been agreed by all the Juftices, that the exception in 23 *H.* 8. *c.* 9. extends only to probate of wills. But note it does not appear in this cafe where the will had been proved.

Dominus Rex *verf.* Kimberley.

THE defendant was brought up by *habeas corpus*, being committed to *Woodftreet Counter*, for felonioufly marrying *Bridget Reading*, contrary to an *Irifh* act of Parliament, 6 *Ann.* in order to be tranfmitted to *Ireland* to be tried, the offence being committed there.

Juftices of peace in *England* may commit a perfon offending againft the *Irifh* law, in order to be fent over. Fitzg. 111. 1 Barn. B. R. 225. S. C. 14 Vin. Abr. 569. pl. 47.

Strange moved that he might be difcharged or bailed, infifting that juftices of the peace in *England* are confined to act only as to fuch offences as are againft the laws of *England*, and committed in *England*; and the provifo in the *habeas corpus* act gives no power as to offences in *Ireland*, but leaves it on the former practice.

Sed per curiam, It has been done in Colonel *Lundy*'s cafe, 2 *Vent.* 314. and in 3 *Keb.* 785. the court refufed to bail a man committed

committed for a murder in *Portugal*. If application is not made to have him sent over in a reasonable time, you may apply again.

Thereupon the defendant was remanded, and upon application to the Secretary of State, it was referred to Mr. Attorney General, to consider of the manner of sending him over: and upon an attendance by counsel, Mr. Attorney reported, that he might be taken from the *Counter* by a messenger, who should have a warrant to carry him to *Ireland*, whither he was carried, tried, condemned, and executed.

[849]

Between the Parishes of Elstead *and* Holliburne.

Renting above 10 *l. per annum* in two parishes is a settlement where he lives. 2 Sess. Ca. p. 159, no. 130. 2 Bott. by Const. 167. pl. 204. S. C. So *Pas.* 4 *Geo.* 2. in the case of *Stapleford* in *Leicestershire*, he took 3 *l. per annum* in the place he was certificated to, and 40 *l.* in the next parish, but lived where the 3 *l.* was, and held a settlement there. 1 Sess. Ca. p. 414. no. 328. 2 Bott. by Const. 214. pl. 237. S. C.

UPON an order of settlement, it was specially stated, that a man rented a house and land in *Elstead*, for which he paid 9 *l.* 10 *s. per annum*, and that he rented 3 *l. per annum* of the same person, but lying in the adjacent parish, that he lived in *Elstead*. And on consideration of the cases of *South Sydenham* v. *Lamerton*, *ante* 57. and *St. John's in Hertford* v. *the parish of Amwell*, *ante* 529. This was held to be settlement in the parish of *Elstead*.

Dominus Rex *vers.* Taylor.

Indictment too general. 1 Barn. B. R. 229. 2 Sess. Ca. p. 32. no. 26. S. C.

AN indictment was quashed for generality, being *calumniatrix et communis et turbulenta pacis perturbatrix, ac lites, rixas et pugnas movit et incitavit, et quendam Josephum Atherton verbis, contumeliis, et opprobriis abusa fuit in domo ipsius J. A.* (1).

(1 Rex v. *M. Cooper*, *post*. 1246. 2 *Hawk. P. C. c.* 25. § 59, 322.

Whitlock *vers.* Humphreys.

Practice. *N. B.* Both are not to be inclusive, for *Mich.* 6 *Geo.* 2. *Fergerson* and *Norcliffe*, the countermand was 16th, and the assizes 19th, and held that costs should be paid.

UPON debate it was settled, that to save costs for not going on to trial, it would be sufficient to countermand notice in a town cause two days, and in a country cause four days before the assizes; and that it should be a general rule, without

considering

confidering the charges or inconveniences in any particular cafe (1).

(1) But now by 14 *Geo.* 2. c. 17. *f.* 5. If the *venue* be laid in the country; or if in *London* or *Middlefex*, and defendant refides above 40 miles from either *London* or *Weftminfter*, the notice of countermand muft be at leaft fix days before the intended trial, to fave cofts. *Vide Hullock on Cofts* 408.

Dominus Rex *verf.* Greenhaw.

A *Certiorari* was granted to remove an indictment for not doing the ftatute labour in the highway, on producing a precedent where it was done, in the cafe of *Rex* v. *Eachard*, 12 *Geo.* 1 (*a*).

Certiorari to remove indictment for not doing ftatute labour on the highway.

(*a*) Rep. 1 Sefs. Ca. 383. no. 508. but not S. P.

Law *verf.* Davis.

UPON a fpecial verdict in ejectment, the queftion was upon the following words, whether the fon of the devifor took an eftate for life, or an eftate-tail: " *Item*, I give and " *devife my lands in *A.* to my wife *Anne* for her life, and after " her deceafe to my fon *Benjamin*, and his heirs lawfully begot" ten, *viz.* the firft, fecond, third, fourth, and every other fon " and fons fucceffively lawfully to be begotten of the body of my " faid fon *Benjamin*, and the heirs of the body of fuch firft, fe" cond, third, fourth, and every other fon and fons according " to feniority; and in default of fuch iffue, to my right heirs for " ever." And it was held by all the court, that though the firft words, if you ftop at the *viz.* would carry an eftate-tail to *Benjamin*, yet according to *Hob.* 171. what comes after *viz.* muft be taken in to explain the former words, and by the laft it appears he intended his fon fhould not have it in his power to prevent the eftate's being enjoyed by his children; or if he had none, from reverting to the right heirs of the devifor (1): and they faid it

Devife to *B.* and his heirs lawfully begotten, viz. the firft, fecond, and every other fon of the body of *B.* and the heirs of the body of fuch firft fon, *&c.* *B.* takes only an eftate for life.

L. Raym. 1561. 1 Barn. B. R. 238. 2 Eq. Abr. 316. pl. 28. Fitzg 112. S. C.

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(1) The word "*heir*" accompanied with other words of limitation has been held to operate as a word of purchafe in *Archer's* cafe. 1 *Rep.* 66. *Cheek* v. *Day.* *Moor* 593. 2 *Roll. Abr.* 417. (G.) *pl.* 7. So the words "*iffue* " *or iffue male*". *Luddington* v. *Kime*, *Ld. Raym.* 203. 1 *Salk.* 224. *Backhoufe* v. *Wells*, 1 *Eq. Ca. Abr.* 184. *pl.* 27. *Doe ex dem. Barnard et al'* v. *Reafon*, 3 *Wilf.* 244. *Doe* v. *Collis*, 4 *Term Rep.* 294. So likewife as in the prefent cafe the words *heirs or heirs of the body* *&c.* have been reftrained by fubfequent

it was no new thing in construction of wills, to let subsequent words intirely destroy the force of preceding ones, as in the common case of a devise to *A.* and his heirs, and if he dies without issue, remainder over: the first if alone would certainly carry a fee, but the latter qualify the former, and make it an estate-tail (2). So if a devise be to *A.* and his heirs, and for want of heirs then to *B.* the brother of *A.* these last words restrain the word *heirs* to mean only *heirs of the body*, because it is impossible that *A.* can want an heir general whilst he has a brother (3).

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sequent words to signify a particular heir. In *Doe* v. *Laming*, 2 *Burr.* 1100. 1 *Black. Rep.* 145. *Lisle* v. *Gray*, 2 *Lev.* 223. *Raym.* 278 *Allgood* v. *Withers*, in *Chanc.* 1735. Cited 2 *Burr.* 1107. 1 *Vez.* 150. *Fearne C. R.* 177. *Et vide* the opinion of *L. Kenyon*, C. J. in *Denn* v. *Puckey*, 5 *Term Rep.* 306. And see *Goodright* v. *Puleyn*, *ante* 729. and the note.

(2) *Chaldock* v. *Cowley*, *Cro. Jac.* 695. *Morgan et Uxor*, v. *Griffiths*, *Cowp.* 234. *Denn* v. *Shenton*, *Cowp.* 410. *Idle* v. *Coke*, 1 *P. Wms.* 71. *Porter* v. *Bradley*, 1 *Term Rep.* 143.

(3) *Webb* v. *Herring*, *Cro. Jac.* 415. *Parker* v. *Thacker*, 3 *Lev.* 70. *Tyte* v. *Willis*, *Cas. temp. Talb.* 1. *Allen* v. *Spendlove*, 1 *Freem.* 74. *Pickering* v. *Towers*, *Amb.* 363. *Ives* v. *Legge*, 3 *Term Rep.* 488. note. *Doe* v. *Perrin*, *ib.* 491. So also where the remainder is limited to the heirs of the testator himself, if they must also be heirs to the first devisee. *Nottingham* v. *Jennings*, 1 *P. Wms.* 23. *Com. Rep.* 81. See also 3 *Com. Dig. tit. Devise* (N. 5.) 428.

Holt *vers.* Ward.

Clarencieux is part of the name of the person. 1 Barn. B. R. 308, 247. S. C. 1 Com. Dig. Abatement (E. 20.) (E. 21.) p. 20, 21, (F. 19.) p. 39, 41.

THE plaintiff declared upon a contract of marriage against the defendant by the name of *Knox Ward*, Esq; The defendant pleaded in abatement, that the late King by letters patent under the great seal of *Great Britain*, dated 29 *Junii anno regni sui undecimo*, created him King at arms and principal herald of the South, East, and West parts of *England*; *et nomen ei imposuit Clarencieux*, to hold *tam diu quam se bene gereret*; *unde* he is not stiled *Clarencieux* in the bill, he prays it may abate. The plaintiff prays *oyer* of the letters patent, by which it appears he is stiled *Knox Ward*, Esq; before the words of creation, and then demurs. And on argument it was held by the court, that this must be taken, not as an addition, but as part of his name; according to Sir *William Dethick*'s case, *Cro. El.* 542. 1 *Leon.* 248. and therefore they gave judgment to abate the bill. *Post.* 937.

Dominus Rex *verſ.* Acton.

THE defendant was the deputy keeper of the *Marſhalſea* prifon: and upon the addreſs of the Houſe of Commons was proſecuted for ſeveral murders ſuppoſed to have been committed by him on priſoners in his cuſtody. He was tried on four ſeveral indictments, whereon the only queſtion was, whether a place within the priſon called the ſtrong room was a proper place to confine diſorderly priſoners in: and the jury upon all the four trials acquitted him, to the ſatisfaction of almoſt every body; and in conſequence of theſe acquittals he was diſcharged. Preſently after he was at liberty, a ſingle juſtice of the peace, upon informations of a fifth perſon's having been put into the ſame ſtrong room, and dying within a year after, thought fit to commit the defendant again for murder. And upon a *habeas corpus Strange pro def'* moved he might be admitted to bail, on producing copies of the informations, and affidavits of the former trials, and of the identical nature of the offences: but the court refuſed to look into the informations, though they were preſſed with the Lord *Mohun*'s caſe, *Salk.* 104. where they looked into the depoſitions taken by the coroner upon a motion to bail. And in the preſent caſe they remanded the defendant, who lay in priſon till the next aſſizes, when the grand jury did him the juſtice to return the bill *ignoramus*, and he was diſcharged.

Court will not examine whether a man be committed for the ſame ſort of offence of which he has been convicted, in order to bail him. 1 Barn. B. R. 250. S. C.

Skin. 603.

Lynne *verſ.* Moody.

THE plaintiff brought treſpaſs in *C. B.* for taking an exceſſive diſtreſs: and on error in *B. R.* the judgment was reverſed, for that treſpaſs would not lie where the entry at firſt was lawful, and here is nothing ſubſequent to make it a treſpaſs, as there is where the diſtreſs is abuſed: the remedy ought to be by ſpecial action founded on the ſtatute of *Marleberge*, 3 *Lev.* 48. for at common law the party might take a diſtreſs of more value than the rent, ſo as to make it more eligible for the party to redeem the goods by payment of the rent: here was ſome rent due, ſo a diſtreſs was lawful; and as it is but one act, it cannot be a treſpaſs (1).

Treſpaſs does not lie for taking an exceſſive diſtreſs. Fitzg. 85. S. C. fuller.

(1) *Hutchins* v. *Chambers*, 1 *Burr.* 579. S. P. But treſpaſs will lie where the diſtreſs appears to be exceſſive both upon the face of it, and upon the pleadings, as where 6 ounces of gold and 100 ounces of ſilver were taken for 6*s.* 8*d.* and this is an exception to the general rule. *Moir* v. *Munday*, *H.* 28 *G.* 2. *B. R.* cited 1 *Burr.* 582. 590.

Dent *verſ.* Prudence and Bond.

Churchwardens cannot commence a ſuit in their own names after their year is expired. But if commenced within, they may proceed in it after. 1 Bac. Abr. 376. 1 Burn's Eccl. Law 381. 3 Com. Dig. Eſglise, (F. 3.) 656.

Stra. 283

IN 1725, during the time *Prudence* and *Bond* were churchwardens of *St. Matthew*'s in *Iſwich*, a rate was made for the repairs of the church: and the appellant *Dent* not paying his ſhare, the churchwardens after their year was our cite *Dent*, to compel a payment; and he appearing inſiſted to be diſmiſſed, for that the ſuit was not begun within their time. But the Judge decreeing him to anſwer, he appealed to the Arches; where the Judge pronounced againſt the decree to anſwer, before there was a conteſtation of ſuit, but retained the cauſe. From thence *Dent* appealed to the Delegates. And upon a hearing 17 *December* 1729, before the biſhops of *Norwich* and *Carliſle*, Chief Juſtice *Raymond*, Baron *Carter*, Sir *Henry Penrice*, and other doctors, it was determined, that *Dent* ſhould be diſmiſſed, and that *Prudence* and *Bond*, who can ſue only in a politick capacity, could not inſtitute any ſuit after that capacity was gone. It was agreed, that if the ſuit had been begun within their year, they might have proceeded in it after their year was out; it being *ex neceſſitate* to prevent people from delays, in order to wear out the year. So is 1 *Danv. Abr.* 788. *Cro. Eliz.* 145. 179. 1 *Leon.* 177. and Dr. *Prideaux's directions to churchwardens* 60, 61. But in regard this was not commenced till the year was out, and no precedent was ſhewn to warrant this ſuit, the appellant was diſmiſſed. *Strange pro Dent.*

Hilary Term

3 Georgii 2 Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Francis Page, *Knt.*
James Reynolds, *Esq;* } *Justices.*
Sir Edmund Probyn, *Knt.*

Sir Philip Yorke, *Knt. Attorney General.*
Charles Talbot, *Esq; Solicitor General.*

Between the Parishes of Aldenham *and* Abbots Langley in com' Hertford.

UPON a special order of sessions, it was stated, that a poor person forty years ago came into a parish and lived there ever since; that he attended the leet, amended the highways, had a pew in the church, five children, and did watch and ward. *Sed per curiam*, Those are not annual offices in the parish, and the 1 *Jac.* 2. *c.* 17. was purposely made to avoid these constructive notices, and require notice in writing; and therefore they held it no settlement (1).

There cannot be a settlement by constructive notice.

2 Seff. Ca. p. 145. No. 127. 1 Barn. B. R. 138. 148. 285. Foley 119 (a). 2 Bott by Const 125. pl. 163. S.C.

(a) Foley reports that it was held tantamount to a notice in writing, but all the other reports of the case are contra.

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(1) *Vide Rex* v. *Inhabitants of Whittlesea*, 4 *Term Rep.* 808.

Coleman *verſ.* Mawby et al'.

Execution of a writ of inquiry may be adjourned after it is entred upon. Post. 1259.

[854]

UPON executing a writ of inquiry before the Chief Juſtice, the plaintiff could not prove the quantity of goods for which the action was brought, for want of a ſervant who was abſent through an apprehenſion they ſhould not want his teſtimony. And upon conſideration the Chief Juſtice held, that he might adjourn it to the next ſittings, and accordingly the jury were adjourned over, the plaintiff ſubmitting to pay coſts: he compared it to the caſe of a coroner's inqueſt, or a commiſſion of lunacy, where the jury are adjourned over ſeveral times, it being but an inqueſt of office. *Strange pro def'.*

Caſtell vid. *verſ.* Bambridge et Corbet.

Motion in chancery to ſuperſede a writ of appeal which ran *quia N. fecerit, &c.* inſtead of *ſi N. fecerit nos &c.* refuſed. Held in B.R. to be a good ground for ſuperſedeas, but motion denied there as not being in their power. If A. carries his priſoner B. againſt his will to a houſe where he knows the ſmall pox is, and that B. has not had it, or detains him there when he deſires to be removed, and B. catch it, and dies thereby, it is murder. Fitzg. 94. 1 Barn. B. R. 204. 240. 253. 275. S. C. Moſl. 199. S. C. in Canc. upon the application to ſuperſede the writ.

THE defendant *Bambridge* having been proſecuted on the report of the committee of the Houſe of Commons for the murder of the plaintiff's huſband, who was a priſoner in the *Fleet* under the cuſtody of *Bambridge* the warden, and having on the trial been honourably acquitted upon the proſecutor's own evidence, was followed with an appeal, to which *Corbet*, who on the croſs examination appeared to be a material witneſs for *Bambridge*, was now alſo made an appellee: and the writ of appeal running *quia Maria Caſtell vidua fecit* (1), *ſecur' de clamore ſuo proſequendo per Thom' Wagſtaffe et Poſton Stracy*, contrary to the uſual form which is, *ſi* the appellant *fecerit nos* (*i. e.* the King) *ſecur'*, application was made to the Lord Chancellor *King*, to ſuperſede this writ, upon affidavits that the appellees were both in cuſtody upon it, but that no ſecurity had been given, and the writ reciting it as an act done before the emanation of it, the ſheriff had not taken any, as he would have done if it had been put by way of condition *ſi fecerit*. And it was argued by me, that the ſtatute *Weſtm.* 2. *c.* 12. giving the appellee a remedy againſt the appellant, her pledges, and abettors; it was not a matter of form, but ſecurity ſhould be entred into by perſons of ability. To which it was anſwered by Mr. Attorney General, that it was ſufficient if there were pledges at any time before judgment. Sir *T. Jones* 154. 9 *Co.* Dr. *Huſſey's* caſe. *Cro. Jac.* 413.

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(1) *Fecerit.* See the other reports, and next page, line 7.

To

To this it was replied, that at that rate the appellee would never have any remedy againſt the pledges: for if he was convicted, he would be intitled to none; and if he was acquitted, the appellant would never pray judgment; and it would be an artifice to elude the law.

Notwithſtanding all which the Chancellor would do nothing in it, but ſaid if the *quia fecerit vos* were wrong, we might have advantage of it; and ſo refuſed to make any order.

Upon the firſt day of *Michaelmas* term laſt, the writ being returned, and the appellees both brought up by *habeas corpus*, and turned over to the King's Bench; it was there moved to have the proceedings ſet aſide, upon the ſame affidavit of there being no pledges. And the court here were of opinion, it was a very good objection, and a foundation to ſuperſede the writ: but then they ſaid, it was not in their power, who were to take the writ as they found it, and not hear affidavits to contradict the ſuggeſtions of the writ; and therefore the having ſecurity being recited as an act done, they muſt take it to be ſo, and could not relieve. [855]

Upon this the appeal was arraigned, ſetting forth that the appellant's huſband was a priſoner in the *Fleet* under the cuſtody of *Bambridge* the warden, who made an aſſault upon him, and contrary to his will carried him to the houſe of *Corbet*, a victualling-houſe within the *Fleet*, and there impriſoned him, where one *White* then lay ill of the ſmall pox, which *Caſtell* had never had; that the appellees had notice of this, and were deſired to ſuffer him to remove to another place in the priſon, which they refuſed, and afterwards *Caſtell* fell ill of that diſtemper, and died in *Corbet*'s houſe, whereby the count concludes, the appellees were guilty of his murder.

Without ſtaying for a copy of the declaration the appellees *inſtanter* pleaded Not guilty, and their plea was rehearſed in *French*, and iſſue joined.

Appellee bailed having been acquitted upon an indictment. Vide poſt. 858.

Then it was moved, that the appellees might be bailed. And upon debate the court were of opinion to bail *Bambridge*, and not *Corbet*. And the reaſon they gave was, that *Bambridge* had been acquitted, which was a ſtrong preſumption of innocence, and the Judge before whom he was tried had certified that he was very well ſatisfied with the verdict: and they ſaid they would bail in all caſes after an acquittal on the indictment, unleſs the Judge was diſſatisfied with the acquittal; and that was the reaſon they denied to bail in *Slaughterford*'s caſe, becauſe *Holt*

Chief Justice had sent out the jury again to consider whether they would stand to their verdict of acquittal; and when they insisted upon it, he himself ordered the appeal.

Two bail *corpus pro corpore*, and also in 1000*l*. where the appeal was by writ on the civil side. But four where it comes on the crown side by *certiorari*. Post. 911.

But as to *Corbet* there was no foundation to bail, for they denied that it was of course to bail in an appeal. So *Bambridge* was bailed by two persons *corpus pro corpore*, who justified in 1000*l*. each. And it was agreed, that in an appeal by writ on the civil side two bail only are required; but had it come on the crown side by *certiorari*, there must have been four.

Then it was moved to fix a time for the trial, the appellees offering to take short notice. But it being by original, there was a necessity to have fifteen days between the *teste* and the return of the *distringas*, and they could not be tried on the *venire*, because being in *London*, there could be no trial at bar, (the citizens not being to be brought out of the city) and as it must be tried at *nisi prius*, there must be a *distringas*.

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It is not necessary to take out the *venire*, and make it returnable as soon as may be, though it must bear teste the day issue is joined.

Towards the latter end of the term it was moved that the appellees might be discharged, there being a discontinuance, for that no *venire* had been taken out: and in appeals, which are a recent prosecution, every delay is a discontinuance: and *Cro. Jac.* 283. *Yelv.* 204. were cited. But upon consideration the court held, that it was not necessary to take out the writ and make it returnable the soonest it might be, though it must bear *teste* the day that issue is joined: and then the appellant took out a *venire*, *teste* 23 *October* and returnable 25 *November*, which the court looked upon as an affected delay, and therefore admitted the other appellee *Corbet* to bail: they said it appeared he might have been tried the sitting after the term, and then upon his acquittal he must have been *instanter* discharged by the Judge of *nisi prius*, according to the statute 14 *H.* 6. *c.* 1. (*a*)

(*a*) Post. 858.

Court will not make a rule upon the keeper of the records at the *Old Baily* to attend the trial of an appeal with the record of acquittal on an indictment for the same fact. It would not be evidence.

Both being thus out upon bail, appeared on the several continuance days according to their recognizance, and the appellant also appeared. And the beginning of this term the appellees moved for a rule on Mr. *Tanner* the officer who keeps the records at the *Old Bailey*, to attend the trial with the record of *Bambridge*'s acquittal, he not being allowed a copy of it. But the court refused to make any rule, and said if it was brought, it could be no evidence.

Quaker no witness in an appeal.

Upon the 26th of *January* the trial came on at *Guildhall* before the Chief Justice, and in the course of the evidence the appellants' counsel called a quaker, and insisted that this is a civil suit, in which he might be a witness. But the Chief Justice said,

ſaid, it was to this purpoſe a criminal proceeding, and therefore he could not be a witneſs (1).

After a long examination the Chief Juſtice directed the jury, that if they believed *Caſtell* was carried to *Corbet's* againſt his conſent, and was there ſo detained, that *Bambridge* and *Corbet* knew the ſmall pox was there, that *Caſtell* had not had it, but feared it, and deſired to be removed, or not be carried there at all, that he caught the ſmall pox of *White*, and died thereof; then the appellees would be guilty of murder (2); but if any one of theſe facts were not proved to the ſatisfaction of the jury, they ought to be acquitted. And there being no pretence to charge either of the appellees, the jury brought them in Not guilty.

And the Chief Juſtice being moved to proceed againſt the appellant, who was in court, upon the ſtatute *Weſt.* 2. *c.* 12. ſaid, he was only to try the iſſue, and that the application was proper above, or by writ of conſpiracy, and all he could do was to record the verdict. [857]

Upon 3 *Feb.* following the appellees appeared in court, and having given a rule upon the *poſtea*, which they then produced, and no body appearing to ſay any thing againſt them, they were diſcharged (3). *Strange pro appellatis.*

(1) *Vide Acheſon* v. *Everitt*, *Cowp.* 392. *Rex* v. *Wych*, *poſt.* 872.

(2) *Rex* v. *Huggins*, *poſt.* 884. *Foſt. Cr. Law* 322.

(3) See a caſe circumſtantially deſcribing the form of proceeding in an appeal. *Bigby* v. *Kennedy*, 5 *Burr.* 2643. 2 *Black. Rep.* 710. S. C.

Gifford *verſ* Lechmere.

Venue changed from London to Middleſex. 1 Barn. B. R. 283. S. C.

THE venue was changed from *London* to *Middleſex* on my motion (1).

(1) According to the report in *Barnard*, the court refuſed it on the circumſtances of the caſe.

Dominus Rex *verſ.* Betteſworth.

There need not be a four days rule on *mandamus's* in town. Fitzg. 125. 1 Barn. B. R. 280. 291. 298. 424. S. C.

A *Mandamus* was granted to Dr. *Betteſworth* as judge of the prerogative court of *Canterbury*, to grant probate of the will of the Earl of *Londonderry*, to the executors therein named

named (1). The day after it was returnable a rule was prayed for the doctor to return the writ *instanter*. And *Strange* for the doctor insisted, that it ought to be a four days rule: but upon conference with the clerks of the crown-office, the court was of opinion, that there was no stated time for these rules, but that the distance of place ought to be the guide; and therefore they ordered the writ should be returned the next day. Whereupon the doctor returned, that it is the custom and practice of the prerogative court, that if any creditor of the deceased enters a *caveat* against granting probate, and swears himself to be a creditor, there goes out a commission of appraisement, till the return whereof the judge has not used or ought to grant any probate; then he sets out, that two creditors, who swore to their debts, entered a *caveat* and prayed a commission of appraisement, which was decreed and issued, but is not yet returnable; *et ea de causa* he cannot as yet grant a probate.

The spiritual court cannot refuse to grant probate pending a commission of appraisement. (2).

Upon argument the court held the return to be ill, for that the judge can only stay the probate where there is a contest about the validity of the will. This commission of appraisement can be of no use but to spend money, and delay the executor from getting in the effects of the testator. And by 21 *H.* 8. *c.* 5. the probate is to be granted *with convenient speed, without any frustratory delay*; and the ecclesiastical court shall never be
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suffered to set up their practice against the law of the land, a peremptory *mandamus* was therefore granted.

If the writ state that the testator had *bona notabilia* in divers dioceses it need not state them to be within the province of the prerogative Judge, especially if he has once acted.

Exception was taken to the writ, that it was only that the Earl had *bona notabilia* at *Westminster*, and in divers dioceses, but do not say within the province of *Canterbury*. But the court over-ruled it, saying they would not presume an inferior jurisdiction, and it appeared he had already done some acts of office as the prerogative *Judge*, and shall not be received now to say it does not appear he has any jurisdiction. *Strange pro def'*.

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(1) *Mandamus* refused when the executors had renounced, for it is not a case within the statutes. *Rex* v. *Bettesworth*, *post*. 956. 2 *Kely*. 139. *Vide post*. 892. *Dunkin* v. *Munn*, *Sir T. Raym*. 235.

(2) *Rex* v. *Dr. Bettesworth*, *East*. 10 *Geo*. 2. *And*. 306. n. A. S. P.

Ragg *verf.* King.

A Prohibition was granted to a fuit for wages by the mafter in the admiralty (1), but denied as to the boatfwain, who is to be confidered as a common mariner. *Salk.* 33. (*a*)

Boatfwain may fue in the admiralty for wages. 1 Barn. B. R. 297. S. C. (*a*) Holt 595. Carth. 578. 12 Mod. 405. S. C.

(1) *Read* v. *Chapman, poft.* 937. S. P. *Wilkins* v. *Carmichael, Doug.* 101.

Dickinfon *verf.* Fifher.

IT was held, that as the defendant muft move to change the venue before plea pleaded, fo the plaintiff muft in like manner move to difcharge the rule on undertaking to give material evidence before replication or plea (1). *Quære tamen* as to the plea, for the plaintiff may not have time, becaufe the defendant may give a plea at the fame time he ferves the rule to change the venue.

Practice.

(1) That plaintiff may bring back the venue after plea pleaded *vide Bruckfhaw* v. *Hopkins, Cowp.* 409. *Vide* alfo *poft.* 1162. 1202.

Dominus Rex *verf.* Hawks.

A Conviction for killing a deer was quafhed, becaufe it was only *convictus eft*, without any judgment *quod forisfaciat* (1).

In convictions there muft be a judgment, *quod forisfaciat.* Fitzg. 124. more full 1 Barn. B. R. 112. 300. S. C.

(1) *Rex* v. *Elwell, ante* 794. *Rex* v. *Vipont*, 2 *Burr.* 1163. and the cafes there cited. S. P. *Rex* v. *Chandler*, 1 *Salk.* 378. *contra.*

Pyle *verf.* Grant.

IN appeal of murder, it appeared the defendant was convicted on the indictment, but pardoned on the report of the judge, and after iffue joined on the appeal, he moved to be bailed, which was refufed, the prefumption being againft him, contrary to *Bambridge*'s cafe. But a trial at bar being ordered this term, and the appellant having taken no ftep to bring it on, but upon the day appointed moving to put it off to a further day; the court

Appellee not bailable if convicted on the indictment though pardoned. 1 Barn. B. R. 255. 260. 276. S. C. Ante 402. 855.

court took the appellee's own recognizance in 500*l.* to appear the laſt day of the term; and ordered that nothing ſhould be done as previous to the day appointed for the trial; that if there was a diſcontinuance, the appellee might take advantage of it. And the laſt day of the term he was diſcharged, the appellant not appearing. *Strange pro appellante.*

Wilſon *verſus* Poulter.

A. knowing of *B*'s. bankruptcy at the requeſt of *B*'s. wife and with his money buys 30 *South-ſea* bonds and gives them to her. *B*'s. aſſignee ſeizes 22 as part of the bankrupt's eſtate, he cannot maintain trover againſt *A.* for the money with which he purchaſed the other eight. 1 Barn. B. R. 77, 118, 136, 142, 284. S. C.

TROVER by the plaintiff as adminiſtratrix of *William Wilſon* the aſſignee of the effects of *Edward Poulter* a bankrupt, for ready money, *ad damnum*, 6000 *l.* Upon Not guilty a ſpecial caſe was made for the opinion of the court.

That *Edward Poulter* on 7 *May* 1724. became a bankrupt, and a commiſſion iſſued againſt him 3 *Auguſt* following, by virtue of which he was declared a bankrupt, and the plaintiff's inteſtate choſen aſſignee, and had an aſſignment.

That 16 *June* 1724. the bankrupt's wife brought to the defendant 3082 *l.* 3 *s.* 11 *d.* of the bankrupt's money, and deſired the defendant to buy ſome *India* and *South-Sea* bonds with it. That the defendant knowing of the bankruptcy, and that the money was part of the bankrupt's effects, received the ſame, and on the ſaid 16 *June*, and 23 *June*, with part of the ſaid money bought twenty *South-Sea* and *India* bonds, and *John Abington* the defendant's ſervant, by defendant's order, with other part of the money bought ten bonds more, and defendant delivered all the thirty to the bankrupt's wife. That on 2 *September* 1724. the aſſignee having notice where ſome of the effects were depoſited by the wife, ſeized twenty-two of the bonds for the benefit of the creditors, and accepted them as part of the bankrupt's eſtate. And upon this ſtate of the caſe the point reſerved was, whether the defendant is liable in this action to make ſatisfaction for the money with which the eight bonds that did not come to the hands of the aſſignee were purchaſed.

Strange pro quer' argued, that here was a plain property in the plaintiff and a converſion in the defendant. In order to make it out, there are ſome things ſtated, which ſhould be laid out of the caſe. 1. That at the time of receiving the money and buying the bonds, there was no commiſſion; the tranſaction by defendant being in *June*, and the commiſſion and aſſignment not till *Auguſt* following. But as to this it is ſtated that he became a bankrupt 7 *May* before, and from that time the property of the aſſignee

assignee commences (1). 2. That ten of the bonds were bought by another person, one *John Abington*. But this is stated to have been done by the defendant's order, and with part of the money received by him of the bankrupt's wife, and that the defendant had the bonds of his servant, and delivered them to the [860] wife, by which he has made it his own act. 3. The seizing twenty-two of the bonds by virtue of the commission for the benefit of the creditors, and accepting them as part of the bankrupt's estate. This is not stated to be done in affirmance, and by way of authenticating the act done by the defendant in purchasing these bonds; but only to lessen the damages, which otherwise must be given for all the money, and to shew that in point of justice and equity the plaintiff is intitled only to a satisfaction for the money with which the eight bonds, not yet brought to light, were purchased; for if the plaintiff had taken a verdict for the whole, she must have been compelled in a court of equity, either to deliver up the twenty-two bonds, or abate for them; and it is in ease and favour of the defendant, who had parted with the possession, to take these bonds out of the hands of a third person, and at the same time allow him the benefit of the seizure. The purchase of every bond is a distinct act, and where that which is the produce of my money is to be come at, I have my election to sue for the money, or the thing so purchased with my money. *Hussy* v. *Phydall*, 12 *W.* 3. (*a*) if the bankrupt sells goods, the assignee may bring trover for the goods, or affirm the sale and sue for the money; and if the bankrupt does so in two instances, the assignee is not bound to make one uniform election for both cases; but as they are distinct and independant, he may sue one vendee for the money, and as to the other may disaffirm the sale and maintain trover. In this case it is stated, that the bonds were purchased at different times, some upon the 16th, and others upon the 23 *June*; not that it is material what he did with the money, for as he was possessed of the money of the assignees, he can no otherwise discharge himself of it, than by a payment to them. 4. The danger that in general will attend brokers and others, if they should be charged merely on account of the money's passing through their hands, may be laid out of the case. If they do not know it, it may be hard; but if they know it they ought to be charged, and there is express knowledge stated in this case, not only of the

(*a*) Rep. 12. Mod. 324. Holt 95. 3 Salk. 59.

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(1) See *Cooke's Bank. Laws*, 652 to 688. *Bull. L. N. P.* 41.

bankruptcy,

bankruptcy, but that the money was the bankrupt's effects (2).

If these things are laid out of the case, there will then be a plain property in this money in the plaintiff, and a conversion in the defendant. It will be no more than this: a man knowing of the bankruptcy, and having money or goods of the assignee, disposes of them without his authority; and it will not at all differ from the case of *Parker* v. *Godin*, *M.* 2 *Geo.* 2. *ante* 813. where *Satur* a bankrupt left plate with his wife, who to raise money delivered it to her servant, who went along with the defendant to
[861] a broker's door, and there the defendant took the plate and went into the shop and pawned it in his own name, and gave his own note to repay the money, and on receipt of it went back and paid the money to the bankrupt's wife: and in trover for the plate, it was held that he was liable, though he did not apply the money to his own use. He was charged with the plate as having had it in his custody, and not delivering it to the assignee; and there the plate was forth-coming, but these eight bonds are not. There the directions were to pawn, here to buy. There the produce of the plate was delivered to the wife, here the produce of the money was delivered to her. In neither case had the defendant any advantage; if any difference, his disadvantage was greater than these here, because there he had by note subjected himself to pay the money.

It may be said he laid out the money as directed, and pursued his authority. To which it is answered, that no body could give him any directions or authority but the assignee, and he was not privy to the transaction; for though in another case it shall be taken that the wife acts as a servant, yet that is only where the husband himself has power; and though the assignee comes in in privity under the bankrupt, yet that is only as to all transactions previous to the bankruptcy; but no act of the bankrupt subsequent can bind the assignee, there being then no privity between them.

The court without hearing any argument of the other side, declared, that if the four things insisted on for the plaintiff were all to be laid out of the case; the conclusion drawn from thence, and the application of the case of *Parker* v. *Godin* would be right; and as to the first, second, and fourth things, they thought they ought to have no weight against the plaintiff; but as to the

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(2) *Vernon* v. *Hankey*, 2 *Term Rep.* 113. 3 *Bro. Chan. Ca.* 313. and *Cooke's Bank. Law*, 3 *ed. ut supra.*

third, they were all very clear in opinion, that the ſeizing part of the bonds was an affirmance of the defendant's act in laying out the money; and that the plaintiff therefore could not avow the act as to part, and diſavow it for the reſt (3). So the defendant had judgment.

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(3) *Clarke* v. *Ryall*, 1 *Black.* 642. *Vernon et al'* v. *Hanſon*, 2 *Term Rep.* 287. In 1 *Barn.* 284. the court are ſaid to have doubted whether the purchaſe of *India* and *South ſea* bonds was a converſion under the circumſtances of this caſe.

Sir John Forteſcue Aland *verſ.* Maſon.

ERROR of a judgment in *B. R.* in *Ireland* on a writ of error there brought to reverſe a common recovery. The defendant pleads infancy, and prays that the *parol* may demur; upon which judgment is entered, *quod loquela remaneat* untill his full age; of which judgment a writ of error being now brought, the defendant comes in again and pleads the ſame plea, and prays that the parol upon the writ of error in *England* may demur. To this plea the plaintiff in error demurs, and,

Where error is brought on a judgment that the parol ſhall demur, the nonage cannot be pleaded again to it. Error in *B. R.* in *Ireland* to reverſe a common recovery ſuffered there in *C. B.* The tenant pleads infancy and that he is in by deſcent, and prays the parol may demur, judgment accordingly, which is affirmed upon error here, in *B. R.* He may plead thus, after an imparlance and the plea will be good although it does not mention the the infant's age. L. Raym. 1433. 1 Barn. R. R. 5, 100, 176, 231, 288. Fitzg. 114. Vide 5 Com. Dig. Infant. (D. 1.) 614. 3 Bac. Abr. Infancy. (L. 1.) 162. S. C. Poſt. 1258.

**Filmer pro quer' in errore* argued, that whatever may be the validity of the firſt plea, yet the ſecond will be ill; becauſe that is to bar the plaintiff of his right to diſpute the validity of the firſt plea, and is contrary to the maxim laid down by Lord *Bacon* in his *Elements* 6, 7. *Non valet exceptio ejuſdem rei cujus petitur diſſolutio*: and it is a rule, that you ſhall not plead a matter which will come in judgment upon the firſt ſuit. 7 *H. 6.* 44. *Bro. Error* 70. *Co. Litt.* 128. *a.* If the defendant had to this ſecond writ of error pleadeded *in nullo eſt erratum*, he would ſtill have had the advantage of his principal point, whether the parol ſhall demur or not.

Et per curiam, The plea in *Ireland* was very proper, but the other party has a right to diſpute the validity of the judgment given upon it. Now if this ſecond plea be allowed, the defendant will have had all the advantage of his nonage, though it ſhould happen to be a caſe (as in dower) where he is not intitled to his age. If a writ of error be brought to reverſe a fine, the fine itſelf ſhall not be pleaded in bar. Sir *Thomas Jones* 181. The defendant might ſafely have pleaded *in nullo eſt erratum*, and that would not have been a waiver of his firſt plea.

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It was argued a second time in *Hil. sequen'*, when the court continuing of the same opinion, there was a judgment *quod def' ad errores præd' ulterius respondeat*.

The plea of nonage in *England* having been over-ruled; it came now to be debated on the validity of the judgment of *B. R.* in *Ireland*, by which the parol was to demur, till the infant came of age, and the court being of opinion, that it was proper to consider that as a previous question to the errors in the common recovery, if there were any, *Strange pro quer' in errore* argued, that the plea was ill both as to the matter, and as to the manner of it.

As to the matter of it: he is not intitled to his age, because by his own shewing he is in by descent, and therefore say some books he shall not have his age. 47 *Ass. pl.* 4. 1 *Roll. Abr.* 139. *pl.* 33. "If a man brings a writ of error against the heir of "him that recovered, being within age, and in by descent of the "land, the parol shall not demur for his nonage, though perhaps "he hath a release or other matter to bar the plaintiff, which he "hath not knowledge to plead within age."

Besides, he is not intitled to have his age in this case, because the error assigned is error in law, and not in fact: and that is the distinction taken by justice *Dodderidge* in 3 *Bulst.* 139. where [863] he says, he shall have his age against an error in fact, because he may not be supposed to know his case well enough to answer the matter of fact; but as to error in law, it is a matter that never will lie in his cognizance; the Judges are to look into it for him, and they can as well judge upon the record now, as when the defendant comes of age.

But supposing this was a case wherein the defendant is intitled to his age, yet the manner of the plea is ill. 1. As it is a dilatory, it ought not to have been pleaded after an imparlance. 2. It does not mention of what age the infant is. In *Co. Ent.* 256. the age is mentioned, and there is a very good reason it should be so; because at his full age a resummons must issue, and as this must be founded upon the record, it ought to appear to the court, when it is the proper time to award such a writ.

Sed per curiam, His being in by descent is the strongest reason for having his age, and though the book cited is to the contrary, yet in the same page is a case directly against it, and the current of authorities are so. And as to justice *Dodderidge's* distinction, there is nothing in it, for a release of errors if he knew how to

plead it, would defend him againſt errors in law as well as in fact. As to the form of the plea we think it well enough, and therefore the judgment for the parol to demur muſt be affirmed.

N. B. A fault in the writ of error was amended without coſts, the ſtatute not giving coſts on amending, as it does on quaſhing (1).

(1) *Marret* v. *Gardner*, *Fitz.* 268, S. P. *poſt.* 902. But ſaid that if the rule be *alſo* to amend the aſſignment of errors, it is with coſts. *Ib.*

Easter Term

3 Georgii 2. Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Francis Page, *Knt.*
James Reynolds, *Esq.*
Sir Edmund Probyn, *Knt.*
} *Justices.*

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq. Solicitor General.*

The Mayor of Basingstoke *vers.* Bonner.

An attorney of *C. B.* must plead his privilege in *B. R.* and cannot be discharged on common bail. L. Raym. 1567. S. C. Accord. Barn. B. R. 300. S. C. But said that defendant was discharged on filing common bail and producing his certificate.

ABNEY moved, that the defendant being an attorney of *C. B.* might be discharged on common bail; suggesting it to be the practice of *C. B.* to pay that respect to the attornies of *B. R.* if they are sued there, and cited 2 *Mod.* 181. 1 *Mod.* 10. *Salk.* 544.

Strange contra asserted, that there was no such practice in *C. B.* and as to the case in 2 *Mod.* it is so far from being an authority for the defendant, that it appears the Common Pleas did not discharge him, though arrested in the Palace-yard, but sent him up to the King's Bench. And the other two cases are of attornies of the same court, who no doubt are to be discharged on common bail. *Et per curiam,* The defendant must find

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special bail here, and may plead his privilege in abatement after (1).

Accordingly he put in bail, and pleaded his privilege; to which the plaintiff demurred, and objected that he had not averred himself to be an attorney at the time of filing the bill, but only at the time of pleading; it is *ante exhibition' billæ fecit* (instead of *fuit*) *et adhuc existit un' attornatorum de C. B.* And for this fault the court held it ill, and awarded a *respondes ouster*. [865]

(1) *Snee* v. *Humphreys*, 1 *Wils.* 206. S. P. But where an attorney is arrested by *latitat* in his own court it is a motion of course to discharge him on filing common bail. *Wheeler's* case. 1 *Wils.* 298. *Imp. Prac. K. B.* 474. *ed.* 1791. *Et vide Crossley* v. *Shaw*, 2 *Black.* 1085.

Dominus Rex *vers.* Fisher —— et Saunders.

IN in the case of *Fisher* judgment was arrested after a verdict; and in the case of *Saunders* an indictment was quashed; being taken at an adjourned sessions, and it not appearing what day the original sessions began, to bring it within the time prescribed by the statute (1). *Strange pro rege.*

Where an indictment is found at an adjourned sessions, it must appear the sessions began in time. 2 Sess. Ca. pl. 20. no. 25. 1 Barn. K. B. 278, 327. S. C.

(1) *Vide Rex* v. *Walker*, 2 *Sess. Cas.* 17. *pl.* 21.

Hatton *vers.* Hatton.

STRANGE moved for a prohibition to the prerogative court, in a suit there instituted by the next of kin against the executor, to make distribution of the surplus, there being a specifick legacy to the executor; for that although there have been variety of decisions upon this point in courts of equity, where they have sometimes held the executor to be a trustee for the next of kin as to the surplus; yet there was no instance of the spiritual court's judging of a trust, or setting up any interest contrary to the common law. He insisted, that in the case of a

Where there is a legacy to the executor, the spiritual court cannot entertain a suit for distribution of the surplus among the next of kin under the statute (1). Fitzg. 126. 1 Barn. B. R. 377, 329. S. C.

(1) *Rex* v. *Raines*, 1 *Ld. Raym.* 363. *Edwards* v. *Freeman*, 2 *P. Wms.* 441.

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will the Judge below is *functus officio*, when he has granted probate, as to all purposes but calling for an inventory, according to the statute 21 *H.* 8. *c.* 5. and he cited 5 *Mod.* 247. *Petit* v. *Smith* (*a*), where the testator gave 5 *l.* to the executor, and the daughter cited him to make distribution; and a prohibition was granted. And in a report of the same case in *Cumb.* 378. it is said *per Holt* C. J. they never pretended to distribution in the case of an executor; and they only do it in the case of an administrator by virtue of the statute, and he denied the notion in 2 *Inst.* 33. that executors must divide.

(*a*) 1 L. Raym. 86. 1 P. Wms. 7. S. C.

Dr. *Sayer e contra* would fain have maintained, that the spiritual court had concurrent jurisdiction with the court of Chancery in this case, as well as in legacies; and insisted that this is a partial intestacy as to the surplus. But the court was clearly of opinion, the spiritual court could not intermeddle: and said that in case of an intestacy they used to be prohibited, as in *Carter* 125. 1 *Lev.* 233. and the statute of distributions enlarged, and not barely confirmed their power; as appears by the history of that statute in *Raym.* 496, *&c.*

[866] The rule for a prohibition was made absolute, and the court offered, that if the common lawyers on the doctor's side, who were *Reeve*, *Lee* and *Fazakerley*, would say they thought there was any thing in it, the plaintiff should declare in prohibition; but they declined it.

Dominus Rex *verf.* Martham Bryan.

Intent to defraud not indictable (1). 2 Seff. Ca. p. 22. no. 27. 1 Barn. B. R. 298, 331.

INDICTMENT, setting forth that the defendant came to the shop of *Langley* a mercer, and affirmed she was a servant to the Countess of *Pomfret*, and was sent by her from *St. James's* to fetch silks for the Queen, endeavouring thereby to defraud the said *Langley*; whereas in fact she was no servant of the Countess of *Pomfret*, nor was sent upon the Queen's acount. After verdict for the King, it was moved in arrest of judgment by Mr. *Fazakerley*, that there being no false tokens, or any actual fraud committed, there was no offence indictable; and he cited *Salk.* 379. 5 *Mod.* 18. 6 *Mod.* 105 (*a*), 111, 301 (*b*), 311 (1).

(*a*) 2 L. Raym. 1013. S. C. (*b*) 2 L. Raym. 1179. S. C.

Reeve contra, would have maintained it as being a fraud concerning publick traffick; and though no harm was done, yet an

(1) *Vide* 1 *Hawk. P. C. c.* 71. *f.* 2. *p.* 343. *S. P.* and 30 *Geo.* 2. *c.* 24. and see the cases cited in *Rex* v. *Channell*, *ante* 793. determined upon the same principle.

indictment

indictment would lie, as in the case in 1 *Vent.* 304. of an indictment for a conspiracy to charge a man with a bastard child, when there really was no child, so that the party could not suffer.

Sed per curiam, There the conspiracy was the crime; and an indictment will lie for that, though it be to do a lawful act: this is no more than telling a lie, and no instance being shewn to maintain it, the judgment must be arrested.

Stewart *vers.* Smith.

STRANGE took an exception to the *scire facias* against bail, that on setting out the *capias ad satisfaciendum* in the replication, it appeared the *scire facias* bore *teste* the very day the *capias ad satisfaciendum* was returnable; and would have had it to be ill, because the *scire facias* cannot issue till a *capias ad satisfaciendum* is returned and filed; which could not be presumed to have been done the very day of the return. But the court said it was well enough, and gave judgment for the plaintiff.

Scire facias against bail may be *teste* the day of the return of the *capias ad satisfaciendum*. L. Raym. 1567. S. C.

Sweetapple *vers.* Goodfellow. [867]

IT was held that a writ of error is so absolutely a *supersedeas*, that the plaintiff cannot so much as take out a *capias ad satisfaciendum*, and return *non est inventus*, in order to proceed against the bail (1).

Writ of error where a *supersedeas*. Fitz. 175. 1 Barn. B. R. 334. S. C. 39 Hen. 6. 50. a.

(1) *Smith* v. *Nicholson*, *post.* 1186. *Perry* v. *Cambell et al'*, 3 *Term Rep.* 390. S. P.

Tully *vers* Sparkes.

DEBT upon a bond against the defendant *Sparkes* and *May* as executors of *William Donelson*, setting forth that *Donelson* entered into a bond in 800*l.* conditioned, that if he, his heirs,

The bankruptcy of the obligor does not discharge a bond conditioned for his executor to do an act (1). In debt if there be no writ of inquiry to ascertain the damages sustained by the detention of the debt, *quære*, whether they as well as the costs of suit should be stated to be given with the assent of the plaintiff. Record and transcript amended in B. R. after error brought in the Exchequer Chamber. 1 Barn. B. R. 59, 79, 325, 335, 342. 2 Eq. Abr. 105. c. 5 in n.

(1) *Ex parte Cork*, 7 *Vin.* 72. *Ex parte Groome*, 1 *Atk.* 115. *Dapl.* 7. *Ex parte King*, *Davies* 254. *Ex parte Winchester*, 1 *Atk.* ... *Davies* 524.

heirs, executors or administrators should pay to the plaintiff 400*l.* within two months after the death of the obligor in case he shall marry *Martha Latimer* and she shall survive him, then the bond to be void. The plaintiff then avers, that the marriage was had and the wife survived, and the defendants were made executors; but neither they nor the heir have paid the money according to the condition. The defendant *May* pleads that he never administred or proved the will, and the plaintiff as to him enters a *nolle prosequi*. The other defendant *Sparkes* prays *oyer* of the bond, which is set out without the condition; and then pleads, that the obligor was a trader, and after entering into the bond committed an act of bankruptcy, whereupon the creditors petitioned, had a commission, and he was declared a bankrupt, and had his certificate, which was confirmed. To this the plaintiff, having inrolled the condition of the bond *in hæc verba*, demurred; and the defendant joined in demurrer.

Strange pro quer' argued, that the plea was ill: he laid it down as a general rule, that a creditor shall not be barred *quoad* a demand which he cannot come into a distribution for; although to some purposes a bond is *debitum in præsenti*, yet this is to be considered upon the reason of the several acts relating to bankrupts, which plainly design to bar no body but those who can seek relief under the commission. And this is proved by the statute 7 *Geo.* 1. *c.* 31. which recites the inconvenience, that creditors by bond or note payable at a future day could not prove their debts before the commissioners, and therefore gives a liberty to prove the debt, and have a distribution, making a rebate of in-

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1 *Atk.* 117. But if the husband gives bond to pay a sum of money in his life-time to trustees, to be laid out upon trusts declared in marriage articles, and becomes bankrupt, the trustees may prove this as a debt under the commission. *Ex parte Winchester*, 1 *Atk.* 117. *Ex parte Smith*, *Cooke's Bank. Laws* 3 ed. 267. *Ex parte Brown*, *ib.* 271. *Ex parte Mitford*, 1 *Bro. Chan. Ca.* 398. So also if the bond be conditioned to pay the principal after the death of the obligor, and interest at stated times during his life, and the condition is forfeited before bankruptcy. *Ex parte Winchester*, *Davies* 530. 1 *Atk.* 116. But where the contingency upon which the bond is to be forfeited, is the insolvency or bankruptcy of the husband, the trustees cannot prove. *Ex parte Hill*. *Ex parte Matthews*, *Cooke's Bank. Laws* 291. 3 ed. *Ex parte Bennet*, *ib.* 293. *Ex parte Greenway*, 1 *Atk.* 113. *Ex parte Mitchell*, 1 *Atk.* 120. *Anon.* 3 *Wils.* 271. But the wife's fortune may be settled on the husband until his failure, and then to her separate use. *Lockyer* v. *Savage*, *post.* 947. For other cases of contingent debts *vide Hockley* v. *Merry*, *post.* 1043. and *Cruikshank* v. *Thompson*, *post.* 1160.

terest,

tereſt, where the money is payable at a certain future day, and where the debt aroſe by the ſale of goods. That it could not be done before this act, is proved by the caſe of *Callowel* v. *Clutterbuck*, *Paſch.* 10 *Ann. B. R.* which was a note dated 1 *January*, payable one month after date, the party became a bankrupt 10 *January*; and it was held that the creditor could not come in for a diſtribution, for though it was *debitum in præſenti*, yet the cauſe of action did not accrue until after the act of bankruptcy. [868]

This demand depends on two contingencies, whether it ſhall ever ariſe; firſt the marriage taking effect, and ſecondly, the wife's ſurviving; and it is impoſſible to make a rebate of intereſt, there being no certain time to compute it from. If the bankrupt himſelf would diſcharge himſelf, his plea muſt be that the cauſe of action aroſe before he became a bankrupt; but could that be ſaid in this caſe?

Jocelyn contra inſiſted, that the words of 5 *Geo.* 1. *c.* 24. diſcharged the bankrupt from all debts *contracted due or owing*, in the disjunctive, and that this is certainly a debt contracted: were it a bond *to* the bankrupt on ſuch a contingency, it would certainly be aſſignable: and hereupon he entered into a long argument, to prove that the condition was no part of the bond, but only ſtayeth the effect of it. *Sed per curiam*, As no cauſe of action could accrue upon this bond during the life of the bankrupt, the obligee could never come in for a diſtribution, and therefore ſhall not be barred: the ſtatute 7 *Geo.* has not taken in this caſe, but explains very well what the law is concerning it; and the word *debt* in 5 *Geo.* muſt be expounded a *demandable debt*; whereas it could never appear during the life of the bankrupt, whether this would ever come to be a charge upon his eſtate.

Upon this judgment was given for the plaintiff, and the defendant brought a writ of error in the exchequer chamber, where it was argued again by *Jocelyn* and *Strange*. And Mr. *Jocelyn*, beſides his argument upon the merits, took an exception to the form of the judgment, that the damages and coſts *occaſione detentionis debiti* are not ſaid to be given *ex aſſenſu* of the plaintiff; and for this he cited 1 *Roll. Abr.* 771.

Strange contra argued, that whether it was right or wrong, the defendant could not object it, for that he has no election as the plaintiff has: the plaintiff, if he do not like the damages given by the court, may inſiſt upon a writ of inquiry, 2 *Saund.* 106. But when he waives that, and takes judgment for the damages and coſts aſſeſſed by the court, it amounts to a conſent

to stand by them. And agreeably to this reasoning the objection was over-ruled in *Comb.* 220.

But if there was any thing in the objection, he insisted it was cured by the 16 & 17 *Car.* 2. *c.* 8. which says there shall be no reversal by reason that the costs in any judgment whatsoever are not entred to be by consent of the plaintiff.

[869]

He likewise insisted, that if it was wrong, there might be a reversal only as to the damages and costs, and the judgment be affirmed as to the debt; according to the case of *Henriques* v. the *Dutch West-India* company. *Trin.* 2 *Geo.* 2.

Ante 808.

And as to the merits he repeated his former argument, and cited two cases in chancery, that had been determined since the judgment of *B. R.* *viz.* 23 *December* 1728. when the Lord Chancellor having taken time to consider of three petitions *ex parte Channel*, *ex parte Gazelet*, and *ex parte Bateman*, delivered his opinion, that upon a bottomree bond (2), where the ship was not yet returned, and upon two bonds given on marriage with conditions to leave money to the wife if she survived, the obligees could not be let in to prove their debts before the commissioners, because they were not payable at a certain future time, but depended upon contingencies.

2 Williams 497. Mosely 28. 79. S. C.

Whereupon the judges in the Exchequer Chamber were unanimous for affirming the judgment upon the merits: but *Pengelley* Ch. Baron having some doubt upon the exception about *ex assensu suo*, the cause was adjourned, and the plaintiff applied to *B. R.* upon the 16 & 17 *Car.* 2. *c.* 8. to amend it: where *Jocelyn* argued very elaborately, that the record was not before them (3), and the fault not amendable if it was; notwithstanding which the judges did amend it (4), (though they seemed to think that it could not be a fatal objection) and upon amending the transcript also, it went back to the Exchequer Chamber, where the judgment was affirmed.

N. B. There had been a former action, where the bankruptcy was pleaded, but no petition of the creditors was set out, which the King's Bench held to be necessary, and for want of it the plea to be ill. But then exception being taken to the declaration, that it was not averred the heir did not pay the money, so that a cause of action did not appear, the plaintiff discontinued that suit upon payment of costs.

(2) Bottomree or *respondentia* bonds are now proveable under the commission by 19 *Geo.* 2. *c.* 32. *s.* 2.

(3) *Vide Rutter* v. *Redstone*, *ante* 837.

(4) *Vide Richards qui tam* v. *Brown*, *Doug.* 113. 3 ed. and the note.

Trinity Term

4 Georgii 2 Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq*;

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Esq*; *Solicitor General.*

Dominus Rex *verf.* Clendon.

INDICTMENT, fetting forth that the defendant made an affault upon *Sarah* the wife of *William Beatniff*, and *Elizabeth Cooper*, and did them beat, wound, and evil intreat. After verdict *pro rege*, it was moved in arreft of judgment, that thefe were two diftinct offences, and therefore could not be laid in the fame indictment; and of that opinion was the court, and the judgment was arrefted. *Strange pro def'*. (1)

Cannot join affault on two people in the fame indictment. L. Raym. 1572. 1 Barn. B. R. 337. 2 Seff. Caf. p. 24. No. 28. S. C.

(1) This cafe is denied to be 984. *Vide* 2 *Hawk. P. C. ch.* law in *Rex* v. *Benfield*, 2 *Burr.* 25. *fect.* 89. *p.* 342.

Dominus Rex *verf.* Scott.

THE defendant was prefented at feffions for not attending at the high conftable's petty feffions, to give an account of his fervant's wages; and being in *Englifh*, contrary to 36 *E.* 3. *c.* 15. it was quafhed.

Prefentment muft be in Latin (1).

(1) But fee 4 *Geo.* 2. *c.* 26. & 6 *Geo.* 2. *c.* 14. *f.* 5.

Baynham *verf.* Matthews.

Where there is a traverfe the replication fhould conclude with an averment. Fitzg. 130. S. C.

CASE upon a promiffory note; the defendant pleaded the ftatute of ufury; to which the plaintiff replies, that the note was given for a juft debt *abfque hoc quod corrupte agreatum fuit modo et forma*, and concludes to the country. *Demurrer inde, et pro caufa*, that the replication fhould have been concluded with an averment. And *Fazakerley pro def'* argued that, the replication was ill, there being new matter difclofed; and though there be a negative and affirmative as to one particular fact, yet the plaintiff may conclude with an averment. 1 *Jones* 327. *Lutw.* 1435.

Spelman contra cited *Co. Ent.* 305. 1 *Inft.* 126. *Raym.* 98. That where there is a negative and affirmative, you muft not conclude with an averment. *Et per curiam*, Generally fpeaking it is fo (1), and if the plaintiff here would have been contented to have replied in the common form, *non corrupte agreatum fuit modo et forma*, without a traverfe, he would have been right in concluding to the country (2). But wherever you add a traverfe, there muft be an averment. *Raft.* 689. *Lib. Placit.* 156. (3).

Adminiftrator difcontinues without cofts.

The plaintiff prayed leave to difcontinue, and being an adminiftrator it was granted without cofts (4).

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(1) *Vide Trapaud* v. *Mercer*, 2 *Burr.* 1012 S. P.

(2) *Vide Robinfon* v. *Raley*, 1 *Burr.* 316. *Boyce* v. *Whitaker*, *Doug.* 94. *Smith* v. *Dovers*, *ib.* 428. S. P. *Hedges* v. *Sandon*, 2 *Term Rep.* 439. and the cafes there cited.

(3) But wherever the whole fubftance of the plea is put in iffue by the replication, it may conclude to the country notwithftanding the traverfe. *Vide* the authorities *fupra*. n. (2).

(4) *Eccleſton* v. *Clipfham*, 2 *Keb.* 385. *Bird* v. *Smith*, 2 *Barnard.* 154 2 *Kely.* 710. S. C. *Bennet* v. *Coker*, 4 *Burr.* 1927. *Say.* *Law of Cofts* 96. *Hugh* v. *Lloyd*, *Burt. Prac. Exch.* 156. S. P. But this being difcretionary in the court, they will not permit an executor or adminiftrator to difcontinue, except upon payment of cofts where he has knowingly brought his action improperly. *Harris* v. *Jones*, 3 *Burr.* 1451. 1 *Black.* 451. S. C. in *B. R.* *Hall* v. *Norton*, *Barnes* 169. in *C. B.* *Caf. Pr. in C. B.* 79. S. C. *Et vide* *Hawes* v. *Saunders*, 3 *Burr.* 1584. *Say. Law of Cofts* 87. S. C.

Atkinson *verſ.* Atkinson.

LEAVE was given to plead *non eſt factum*, and a diſcharge by a commiſſion of bankruptcy (1). Plead double.

(1) *Poſt. Philips* v. *Wood*, 1000. S. P. but *non aſſumpſit* and bankruptcy denied. *Newman* v. *Chandler*, *Fort.* 336.

Dominus Rex *verſ.* Charleſworth.

INFORMATION for forging a warrant of attorney to acknowledge ſatisfaction upon a judgment of *Eaſter* term. And after iſſue joined the record appearing to be of *Hilary* term, the information was amended without coſts (the proſecutor having been admitted a *pauper*) and without giving the defendant leave to plead *de novo*; and *Hil.* 10 *Ann. Regina* v. *Simmonds* was cited, where the title of an act ſet forth in an information was amended. *Salk.* 47. 3 *Lev.* 347. (1) Information amended. 1 Barn. B. R. 342. 344. S. C.

(1) *Rex* v. *Hughes*, cited in *Rex* v. *Ellam*, *Caſ. temp. Hard.* 44. 2 *Barn.* 446. *Rex* v. *Wilkes*, 4 *Burr.* 2527. 2532. S. P. and that it may be done by a ſingle Judge at chambers. *Vide* alſo *Rex* v. *Holland*, 4 *Term Rep.* 458.

Slater *verſ.* Swann. [872]

At Guildhall coram Raymond *C. J.*

ACTION upon the caſe, for that the plaintiff was poſſeſſed of an horſe and cart. and the defendant ſo violently beat the horſe, that the plaintiff was deprived of the uſe of his cart and horſe for ſeveral days. On Not guilty for beating a horſe defendant may juſtify in evidence.

The defendant pleaded Not guilty. And the Chief Juſtice allowed him to give in evidence a juſtification for beating the horſe, *viz.* that the plaintiff put his cart before the defendant's door, and prevented a cart which the defendant had hired from coming to take his goods, and therefore he whipt the horſe to remove the cart. And the Chief Juſtice ſaid, this differed from treſpaſs *vi et armis* for aſſaulting a man, where the aſſault is a cauſe of action; but here the aſſault on the horſe is no cauſe of action, unleſs accompanied with a ſpecial damage. And therefore

fore he left it to the jury, on the question whether defendant did any more than was necessary to remove the horse and cart from his door, or beat the horse immoderately. And they found for the defendant. He said, if a hackney coach stands before a tradesman's door, and hinders customers; he may lawfully take hold of the horses and lead them away, and is not bound to take his remedy for damages. *Strange pro quer'.*

Tradesman may remove a coach from before his door.

Cole *verʃ.* Buckland.

Practice. 2 Barn. B. R. 341. 345. S. C.

THE second *ʃcire facias* was returnable the first day of the term, and a week within term the bail moved to stay the proceedings, on the common terms of giving judgment in the *ʃcire facias*, and taking four days to surrender after affirmance in the principal cause. But the court held they came too late, after their time to surrender was gone, and would not revive it again: all they would do was, to stay the suing out execution till after affirmance (1).

(1) *Vide Taʃwell* v. *Stone*, 4 *Burr.* 2454.

Dominus Rex *verʃ.* Wych.

Quaker. 2 Barn B. R. 346. S. C.

IT was denied to read a quaker's affirmation on a motion for an information for a misdemeanor (1).

(1) The affirmation of a Quaker appears to be either received or rejected by the court in a proceeding which is *in its form criminal*, upon the following principles. Where the *form* is *merely criminal*, but the immediate object of the prosecution is a civil recompence, the affirmation shall be received. *Vide Robins* v. *Sayward*, *ante* 441. and the cases there cited. *Rex* v. *Turner*, *post.* 1219. But where it is in substance a criminal prosecution having for its immediate object the punishment of the individual against whom it is had, there it shall not be admitted. As in the present case, *Rex* v. *Bell*, *And.* 200. but no decision. *Rex* v. *Green*, *ante* 527. and the note. But in the cases which come under this last class, a distinction seems to arise, where it is a proceeding instituted *by*, and where it is one had *against* a Quaker. In the former case his affirmation has been refused, although the object of the application was his personal protection. But Lord *Mansfield* seems not to approve of these decisions *Atcheʃon*, v. *Everitt*, *Cowp.* 388. and Lord *Hardwicke* expressed his doubts, and considered it as a question proper to be sent to the Judges. *Ex parte Gumbleton*, 2 *Atk.* 70. On the contrary, where application is *against* a Quaker,

Quaker, his affirmation may be read in his own exculpation. *Vide Rex* v. *Shacklington*, 8 *Geo.* 2. *Hudson* v. *Jones*, 9 *Geo.* 2. *And.* 201. *n.* *Rex* v. *Gardiner*, 2 *Burr.* 1117. But it cannot be read in exculpation of another, where the Quaker is not charged himself. *Ib.*

Broome *verf.* Rice et al'. In C. B. [873]

IN trespass, the defendant justifies under a distress for rent, and shews that he gave notice according to the act of Parliament, had the goods appraised by persons sworn before the headborough, and sold, and the surplus left in the hands of the constable; the plaintiff replied *de injuria sua propria absque tali causa:* and on the trial there was a verdict for the defendant. But upon motion the court set aside the verdict, and ordered judgment to be entered for the plaintiff, and a writ of inquiry of damages to issue. For by the defendant's own shewing the sale cannot be justified; it appearing there was a constable present, so that the headborough had no power to administer the oath. *Vide Carthew* 370.

2 W. & M. c. 5. Defendant justifies under a distress for rent, and shews that the appraisers were sworn before the headborough, *though a constable was present*, the parties go to issue, which is found *pro def.*, the verdict shall be set aside and an inquiry awarded, for the sale cannot be justified. Vide 5 Com. Dig. Pleader, (S. 22.) (S. 28.) *p.* 524.

Coffin *verf.* Gunner.

THE defendant was convicted upon the black act, and ordered to be pardoned. on condition he transports himself. And the act working no forfeiture of goods or land, *Wheat* moved for leave to charge him in a civil action. And upon consideration, that it was not to hold him to bail, or restrain him from performing the condition of his pardon, the court gave leave to charge him with process, that the plaintiff might proceed to get execution (1).

9 Geo. 1. c. 22. Leave given to charge a felon convict with process. L. Raym. 1572. 1 Barnard. B. R. 339. 341. 356. S. C.

(1) *Foxworthy*'s case, 2 *Ld. Raym.* 848. 2 *Salk.* 500. 7 *Mod.* 153. *contra* in the case of attainder for felony. *Sed vide Ramsay* v. *Macdonald*, 1 *Black.* 30. 1 *Wilf.* 217. *Fost.* 61. and the opinion of *Foster* J. there.

Stonehouse *verf.* Mullins.

THE plaintiff in *Trinity* term last brought an action of escape against the marshal, who imparled to *Michaelmas* term, and then pleaded a recaption on 20th of *October*. The plaintiff

In escape, the recaption must be before action brought. 1 Barn. B. R. 354. S. C. 3 Com. Dig. Escape, (C.) 642.

plaintiff demurred. And judgment was given for the plaintiff, because to oust him of his action it should appear the recaption was before the action brought, and this appears to be long after. 3 *Co.* 44. 52. 1 *Jon.* 144. *Cro. Jac.* 657. 1 *Roll. Abr.* 808.

Debt lies on negligent escape. *Strange pro quer'.* 3 Com. Dig. Escape, (B.) 639.

It was also held that debt lies by 1 *R.* 2. *c.* 12. as well where the escape is negligent, as where it is voluntary.

King *verf.* Wilson. At Guildhall.

Frauds and perjuries.

RAYMOND C. J. held, that a parol promise to pay the debt of another in consideration of forbearance, was void by the statute of Frauds and Perjuries (1).

(1) *Rothery* v. *Curry*, *Tr.* 21 *Geo.* 2. *C. B.* *Bull. L. N. P.* 281. *Fish* v. *Hutchinson*, 2 *Wils.* 94. In *Buckmyr* v. *Darnall* 2 *Ld. Raym.* 1087. S. P. and see the distinction between the present case, and *Reed* v. *Nash*, 1 *Wils.* 305. *Williams* v. *Leaper*, in *C. B.* 2 *Wils.* 308. S. C. in *B. R.* 3 *Burr.* 1886.

[874]

Stonehouse *verf.* Ewen.

Elegit. 1 Barn. B. R. 356. S. C. In Com. Dig. Execution, (C. 14.) 130.

PER curiam, If it be returned to an *elegit*, that there are no lands, the sheriff need not return an inquisition; for the use of that is only to deliver a moiety of the lands by, if there are any.

Dominus Rex *verf.* Inhabitantes de Minchinhampton.

Renting the pasture is no settlement. 2 Sess. Ca. p. 90. No. 93. p. 163. No. 132. 2 Bott by Const 145. pl. 185. more full.

PER curiam, Renting a piece of pasture ground of 10*l. per ann.* is a settlement, but not renting the pasture of a piece of ground (1).

(1) This case is said to have been determined upon another point, *viz.* the want of an adjudication. *Burr. S. C.* 316. 2 *Sess. Cas.* 92. *pl.* 93. In *Rex* v. *Lockerty*, *Burr. S. C.* 318. *Wright* J. assented to the doctrine laid down here. But the opinion of *Buller* J. *Rex* v. *Old Alresford*, 1 *Term Rep.* 358. *Rex* v. *Stoke*, 2 *Term Rep.* 451. and the reasoning of all the Judges in *Rex* v. *Tolpuddle*, 4 *Term Rep.* 671. *Nol. Rep.* 73. S. C. is contra.

Dominus Rex *verf.* Earl.

THERE was a rule for the profecutor of an information to pay cofts for not going on to trial: the defendant died before they were paid. And it was held the executor could not have them; nor would he have been liable, if the teftator had been ruled to pay them.

Cofts not to be paid to an executor, by the profecutor of a criminal information. 1 Barn. B. R. 335. 338.

Cowper *verf.* Ofborne.

THE entry of judgment was *ideo conf'* without *eft*. And objected by *Reeve* to be error. *Sed per Strange*, it being abbreviated may pafs for the prefent tenfe of the indicative mood of the paffive verb, *confideratur, it is confidered*; and the judgment was affirmed.

Confideratur is as well as *conf'* *eft*.

The Mayor of Poole *verf.* Bennet.

THE action was laid in the county of *Poole*, and for a duty claimed to be due to the corporation; and on my motion the *venue* was changed to *Hampfhire* (*a*), it appearing manifeftly there could be no fair trial in *Poole* (1).

Venue changed. 1 Barn. B. R. 283. Cafe with fame name but of a different term, and the motion faid to have been refufed.

(*a*) Dorfetfhire, quære.

(1) *Vide Mayor and Commonalty of Briftol* v. *Proctor*, 1 *Wilf*. 298. *Mylock* v. *Saladine*, 3 *Burr*. 1564. *Rex* v. *Amery*, 1 *Term Rep*. 363.

Child et al' *verf.* Hardyman.

At Guildhall coram Raymond *C. J.*

[875]

ACTION for linen fold to the defendant's wife. Upon *non affumpfit*, the delivery was proved. And the defendant proved that fhe had lived in a very lewd manner; one Mr. *Nott* frequently coming to her at her hufband's houfe, and they were locked up together in a bed chamber; and other indecencies paffed between them. And it was alfo proved, that fhe feveral times went to the houfe of this *Nott*, a gentleman in *Wiltfhire*, who lived within three miles of the defendant's houfe. It did not appear farther than that he difliked her going and ftaying at Mr. *Nott*'s. But under thefe circumftances they continued to live together (1). Afterwards on the 18th of *October* 1726,

Wife having lived in a lewd manner while with her hufband, leaves him, and afterwards fends to him to receive her, or allow her a maintenance; he tells her that fhe fhould live in his garret, and refufes her a maintenance. He is not anfwerable for her debts.

(1) That this is immaterial *vide Robifon* v. *Gofnold*, 1 *Salk*. 119. 6 *Mod*. 171. S. C.

ſhe went away from him, and went to *Marlborough*, where ſhe reſided for ſome time. But after the leaving her huſband's houſe it did not appear that ſhe ever ſaw Mr. *Nott*, or lived in a lewd manner. After ſome time ſhe ſent *Lucas* an attorney to her huſband, to deſire that he would receive her again; the huſband told him, that if ſhe came again ſhe ſhould never ſit at the upper end of his table, nor have the government of the children, but ſhould live in a garret. Then *Lucas* propoſed to him, to make her an allowance, and propoſed about 80 *l.* or 100 *l.* *per annum*, he being worth about 5 or 600 *l.* *per annum*. But that was not complied with; and afterwards ſhe came to *London*, and bought the linen to the amount of 53 *l.*

Chief Juſtice *Raymond* was of opinion, that the plaintiff ſhould be called. And accordingly he was nonſuited. He held, if a woman elopes from her huſband, though ſhe does not go away with an adulterer, or in an adulterous manner; the tradeſman truſts her at his peril, and the huſband is not bound.* And this had been ſo adjudged in two or three caſes (2) Indeed if he refuſe to receive her again, from that time it may be an anſwer to the elopement (3). In this caſe he does not abſolutely refuſe to receive her again (4): but that ſhe ſhould neither ſit at his table, nor have any government of the children, but ſhould be kept in a garret; and ſhe deſerved no better uſage. And the plaintiff was nonſuit.

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(2) *Etherington* v. *Parrot*, 1 *Ld. Raym.* 1006. *Longworth* v. *Hackmore*, 1 *Salk.* 118. 12 *Mod.* 244. 1 *Ld. Raym.* 444. S. C. S. P.

(3) *Manby* v. *Scott*, S. P. 1 *Bac. Abr. Baron and Feme.* (H.) 1 *Sid.* 109. 1 *Mod.* 124. 1 *Lev.* 4. 1 *Keb.* 69. 80. 87. 206. 337. 361. 383. 429. 441. 482. S. C. See more upon the ſubject of the huſband's liability to debts contracted by the wife. *Bolton* v. *Prentice*, *poſt.* 1214.

(4) *James* v. *Warren*, *Holt* 104.

Michaelmas Term

4 Georgii 2. Regis. In B. R.

Sir Robert Raymond, *Knt. Lord Chief Justice.*
Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq;*
Sir Philip Yorke, *Knt. Attorney General.*
Charles Talbot, *Esq; Solicitor General.*

Palmer *verf.* Wadbrooke.

IN trefpafs, affault and battery, the defendant moved for leave to plead double, *viz.* Not guilty, and a juftification in defence of his mafter's barge. Which was denied as being contradictory (1).

Not guilty, and a juftification not allowed to be pleaded. 1 Barn. B. R. 368. S. C.

(1) *Fifher's* cafe, *Fort.* 335. R. acc.

Berchere et al' *verf.* Colfon.

THE defendant prevailed with *Collins* and *Bevan* to become bail for him to the fheriff in 300*l.* at the return of the writ they went before a Judge in order to put in bail above. And the defendant himfelf appearing, and infifting that no bail fhould be taken, the Judge refufed to do any thing in the matter. Whereupon I moved the court, that to prevent fo palpable a fraud, the bail might be permitted to perform the condition of their bond, by putting in bail. And leave being given fo to do, the bail was put in before a Judge, and the next day the bail took up the defendant, and furrendered him in difcharge of themfelves.

Bail may be put in above without the defendant's confent. Tidd's Prac. K. B. 126.

Andrews *verſ.* Dingley.

Quaſhing writs is not *ex debito juſtitiæ.* Barnard. K. B. 365, 369. S. C. but ſomewhat different.

STRANGE moved to quaſh a ſpecial *capias* that was *teſte* 17 *June* laſt, the cauſe of action appearing on the face of it to ariſe 21 *September* after. But the court ſaid, quaſhing was not *ex debito juſtitiæ*, and therefore they would give the plaintiff an opportunity to ſet it right if he could, by filing a bill as of this term.

Riſton *verſ.* Francis, Bail of Naſh.

Practice. 1 Barn. B. R. 373. S. C.

AFTER judgment on *ſcire facias* againſt bail, *Agar* moved to ſtay execution, the principal having brought error, and the bail undertaking to pay the condemnation money and the coſts on the *ſcire facias* in four days after affirmance: but in this caſe there being no bail on the writ of error, the court made the bail undertake alſo to pay the coſts on the writ of error, in caſe the judgment was affirmed: and ſaid, it was a favour they were aſking, and they would make them ſubmit to equitable terms.

Worley *verſ.* Glover.

12 Geo. 1. c. 29. Practice on ſerving copies of proceſs. 1 Barn. B. R. 374. S. C.

PER curiam, On the late act 12 *Geo.* 1. *c.* 29. which requires the proceſs to be ſerved, it is not neceſſary to ſhew the party the original writ, as you do on ſervice of rules. The act only requires him to be *ſerved* with a copy, which is the ſame as if it had ſaid *deliver a copy*. *Strange pro def'.* (1)

(1) *Boſwell* v. *Roberts*, S. P. in *C. B. Barnes* 422.

Dominus Rex *verſ.* Elford.

Certiorari. 1 Seſſ. Ca. 323. No. 256. S. C.

AFTER a *mandamus* was taken out under ſeal of the court, the defendant (being the country attorney) found a fault in it, and altered it before he delivered it to the party to whom it was directed. And for this an attachment was granted. And upon his ſubmiſſion and paying coſts he was diſcharged. After this he was indicted before the Judges of aſſize at *Exon* for a forgery. And upon theſe circumſtances he moved for a *certiorari*, but the proſecutor not conſenting, the court refuſed to grant it (1).

(1) *Rex* v. *Beſtland*, *poſt.* 1202. *Regina* v. *Knatchbull*, 1 *Salk.* 150. *Vide Rex* v. *Wells*, *ante* 549.

Winter *verf.* Slow.

ON a motion to ftay the plaintiff's proceedings as a *pauper*, till he paid cofts in a former action, wherein he was nonfuited: it appeared that the nonfuit was upon a flip of the attorney's (1), and not upon the merits of the caufe; which the defendant might have gone into notwithftanding, if he would. The court thought this was not vexatious, and therefore refufed proceedings.

Pauper. 1 Barn. B. R. 375. MSS. S. C.

(1) The flip was, that the action being trover, the only demand and refufal to prove the converfion was made after the writ was fued out. MSS. and 1 *Barnard.* 375. according to which laft report the motion was to difpauper the plaintiff upon this ground; and that that is the proper method of proceeding *vide Neaks* v. *Watts*, *ante* 420. *Taylor* v. *Lowe*, *poft*. 983.

Mallory *verf.* Jennings.

UPON debate it was held, that the want of a writ of inquiry is aided by the ftatute of jeofails; though it was infifted to be fuch a fault as could not happen in the cafe of a verdict.

Want of writ of inquiry is aided. (1) 1 Barnard. B. R. 376. Fitzg. 162. S. C. MSS. S. C.

(1) *Iles* v. *Pitt*, 2 *Ld. Raym.* 1397. S. P.

Duplefis *verf.* Chalk.

DEBT for rent laid in *London* on a parol demife of lands in *Kent*; and the court refufed to change the *venue*, faying they never do it in debt.

Venue. Fitz. 166. 1 Barnard. B. R. 379. S. C. Vide 1 Cromp. Prac. *Of the venue* 113.

Between the Parifhes of Hanmer in com' Flint *and* Ellefmere in com' Salop.

UPON a fpecial order of feffions, the cafe ftated was, that *Randal Fidian* being unmarried, and having no child, was hired into *Hanmer* for a year, and ferved the fame; and afterwards in 1718, he being ftill unmarried, and having no child, was hired into *Ellefmere* in *Salop*, to ferve from *Lady-day* to *Chriftmas* following, (which he did) and was then hired again for a year by the fame mafter, and ferved to the end of *May*.

Connected fervice for a year, although part of it not under the hiring for a year, gives a fettlement. 1 Barn. B. R. 378. 2 Seff. Ca. p. 166. No. 133.

And the feffions adjudged it no fettlement, and fent him to *Hanmer*.

Strange moved to quafh the order, there being in the whole a fervice for a year in *Ellefmere*, and that is enough to fatisfy the ftatute, which requires both a hiring and fervice for a year. And cited the cafes of *Overton* v. *Steventon*, *Hil.* 10 *W.* 3. and *Rex* v. *Inhabitantes de Brightwell in com' Berks*, in both which it is held, that the fervice for a year need not be of the fame identical year for which the hiring for a year was. And upon the authority of thefe cafes the court held it a fettlement in *Ellefmere*, and quafhed the order of feffions, that adjudged it otherwife (1).

L. Raym. 1512. Fort. Rep. 316.

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(1) *Rex* v. *Southmoulton*, 1 *Ld. Raym.* 426. *Brightwell* v. *Weftbally*, 2 *Bott by Conft.* 417. *pl.* 387. *Rex* v. *Aynhoe*, *ib.* 420. *pl.* 389. *Rex* v. *Fifehead Magdalen*, *Burr. S. C.* 116. *Rex* v. *Under Barrow* and *Bradley Field*, *ib.* 545. *Rex* v. *Bagworth*, *Cald.* 182. *Rex* v. *Grendon Underwood*, *ib.* 359. S. P. From thefe cafes it appears to be immaterial as to gaining a fettlement what is the NUMBER *or particular* DURATION *of each of thefe* contracts under which the year's fervice is performed, that is to be coupled with fervice under the yearly hiring, provided they are connected. It feems equally immaterial whether the NATURE of the fervices performed under the feveral contracts are different or not, provided they are fuch as that a contract to perform each of them for a year, and fervice under it would be fufficient to give a fettlement. *Rex* v. *Whinton*, *Burr. S. C.* 280. Where it was held that fervice under a weekly hiring to burl cloth could not be coupled with fervice under a yearly hiring, fo as to confer a fettlement, feems at firft view to contradict this opinion. But the ground of that decifion was, that the *contracts* and not that the *fervices* were of *a different nature*, the weekly hirings being fuch, as that fervice under a fimilar one would not confer a fettlement, though it had been extended in its duration to a year. Mr. J. *Fofter* lays particular ftrefs upon the pauper's not being "in her mafter's fervice either at night or on *Sundays*." There was therefore a fpecial exemption in the contract, which not being created by general law or by local cuftom, but by the agreement of the parties, would prevent a fettlement from attaching to a year's fervice, under a fimilar contract, for a year. As to which point *vide Rex* v. *Macclesfield*, *Burr. S. C.* 458. *Rex* v. *Buckland Denham*, *ib.* 694. *Rex* v. *Kingfwinford*, 4 *Term Rep.* 219. *Rex* v. *North Nibley*, 5 *Term Rep.* 21.

Robinson et al' Creditors of Dr. Tonge *verf.* Tonge et al'. In Canc'.

UPON debate it was held, that an advowfon in fee was real affets in the hands of the heir for payment of debts. 1 *Jon.* 24. And the decree was affirmed in the Houfe of Lords*(1).

Advowfon is affets. 3 Wilf. Rep. 398, 401. 2 Eq. Ab. 259. c. 16, 454. c. 14. 3 Bro. Par. Ca. 556. S. C.

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(1) *Vide* 1 *Com. Dig.* Affets (A.) 562. 2 *Com. Dig.* Chancery (2 G. 1.) 363.

Dr. Gooche *verf.* The Bifhop of London.

THE bifhop libelled in the fpiritual court, fuggefting that Dr. *Gooche*, as arch-deacon of *Effex*, *tenetur folvere* 10 *l.* due to the bifhop as a preftation, for the exercife of his exterior jurifdiction.

Suit may be in the fpiritual court for a preftation, where the title made to it in the libel is general, altho' the plea put in is, that there was no prefcription. 1 Barn. B. R. 391. S. C. Vide 3 Burn's Eccl. Law. 79.

Reeve moved for a prohibition, alleging that they had pleaded there was no prefcription; and then that being denied, a prohibition ought to go for defect of trial.

E contra it was argued by *Henchman et al'*, that the libel being general, it muft not be taken that they go upon a prefcription; but it is to be confidered in the fame light as the common cafe of a penfion, which is fueable for in the fpiritual court: and the nature of the demand fhews it muft have its original from a compofition, it being a recompence for the arch-deacon's being allowed to exercife a jurifdiction, which originally did belong to the ordinary. 2 *Cro.* 666. *Salk.* 58. *Cro. Eliz.* 675. 2 *Inft.* 491.

Et per curiam, They may certainly intitle themfelves *ab antiquo*, without laying a prefcription. And as they have only laid it in general, there is no ground for us to interpofe, till it appears by the proceedings, that a prefcriptive right will come in queftion: if they join iffue on the plea, it will then be proper to apply; but at prefent there ought to be no prohibition. Ante 422.

Dominus Rex *verf.* Wildman.

Mandamus to the clerk of company to deliver books to the company (1).

[880]

Mandamus muft be made out according to the rule.

A *Mandamus* was granted to *Wildman* on my motion, requiring him to deliver to the company of blackfmiths all books, papers, *&c.* which he had in his cuftody by virtue of being their clerk, from which office he had been removed.

The officer took the rule to deliver them to the new clerk; but the *mandamus* was made out right, as I moved for it; however it varying from the rule, the writ was fuperfeded (2), and I afterwards moved and obtained a new one.

(1) "*A mandamus was granted* "*for the clerk of a turnpike road to* "*deliver the books over. Rex v.* "*Robinfon* 1757; *MSS. M. Dun-* "*ning.*" *MSS fee alfo Sheriff and Town Clerk of Nottingham*'s cafe, 1 *Sid.* 31. *Rex* v. *Ingram*, 1 *Black.* 50. *Rex* v. *Chapman*, 1 *Wilf.* 305. *Vide* alfo cafe of *Borough of Calne*, *poft.* 948.

(2) *Vid. Rex* v. *Major de Kingfton*, *fupra* 578.

Buller *verf.* Lufitano de Pina.

Where error abates by the act of the plaintiff execution fhall go.
1 Barn. B. R. 403. S. C.

A Writ of error brought by a *feme* fole abated by her marriage, and then fhe and her hufband bring a fecond; and the court gave leave to take out execution, it being a delay occafioned by the act of the plaintiff in error (1). 1 *Mod.* 285. 1 *Vent.* 100.

(1) *Jenkins* v. *Bates*, *poft.* 1015. S. P. *Vide* 5 *Com. Dig.* Pleader, (3 B. 12.) 706.

Dominus Rex *verf.* Solomon Nathan.

Bankrupt difcharged for faults in the commitment.
1 Seff. Ca. p. 321. No. 264.
1 Barn. B. R. 398. S. C.

THE defendant was committed by the commiffioners of bankrupt, who in their warrant recite that he had been examined before them upon his oath, upon which examination he had notorioufly prevaricated; they therefore commit without bail or mainprize, until he fhall make a full and true difclofure and difcovery of his eftate and effects (1), or be otherwife delivered by due courfe of law.

Upon a *habeas corpus* it was moved that the defendant might be difcharged. 1. Becaufe the ftatute 1 *Jac.* 1. *c.* 15. requires

(1) *Thomas Miller*'s cafe, 2 *Black.* 880, 1141.

there

there ſhould be interrogatories exhibited for his examination, that ſo he may have time to conſider of his anſwer, and it can then appear to the court whether he is bound to anſwer. Perhaps this prevarication might be in a matter they had no power to enquire into. 2. *Prevaricated* is too looſe an expreſſion: he might prevaricate, and yet give a full anſwer at laſt. 3. *Or be otherwiſe diſcharged* is wrong. *Salk.* 351 (*a*). 348.

(*a*) 2 Ld. Raym. 851. S. C.

Et per curiam. *Interrogatories* are a term known in law, and import that the queſtions are put in writing. And *Holt* held the bankrupt ought to have a copy, and time to conſider of his anſwer. It is very dangerous to let people depart from the words of the act, where theſe ſpecial authorities are given. And this commitment not purſuing the words, the priſoner muſt be diſcharged. *Strange pro defendente.*

John Giles's Caſe.

[881]

Mandamus lies not to grant a licence to keep an ale-houſe. 1 Barn B. R. 402. S. C. Cited And. 180. * 2 G. 2. c. 28. ſect. 11, repealed by 26 G. 2. c. 31. ſect. 4. n. to 2d ed.

MR. *Reeve* moved for a *mandamus* to the juſtices of the city of *Worceſter*, to grant a licence to *Giles*, to keep an ale-houſe: inſiſting that it being within a city, the * 2 *Geo.* 2. *c.* 28. did not extend to it.

Strange contra inſiſted, that it was diſcretionary in the juſtices; and cited *Salk.* 45. that no appeal lies from the denial of a licence (1) and if the owner be committed, the want of a licence can only come in queſtion, and not the reaſon why it was denied.

Et per curiam, There never was an inſtance of ſuch a *mandamus*, and therefore we will not grant it.

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(1) "*It was ſaid by Mr. Nares* "*in the caſe of Rex v. Young and* "*Pitts, Eſq. B. R. 20th April* "*1758, that the ſole reaſon why* "*the juſtices of peace refuſed the* "*licence in this caſe was becauſe* "*Giles had ſigned a petition to erect* "*a workhouſe, and though the re-*"*fuſal was ſo ill founded, yet the* "*mandamus was denied. MSS* See alſo the report of that caſe. 1 *Burr.* 556.

Joſhua Cornwall's Caſe.

Servant lets in a thief, it is burglary. 1 *H. H. P. C.* 552. 1 *Hawk. c* 38. *ſ.* 9 *p.* 163. *and then* 10. *S. T.* 433. *in notis.*

HE was indicted with another perſon for burglary. And upon the evidence it appeared that he was a ſervant in the houſe where the robbery was committed, and in the night-time opened the ſtreet door, and let in the other priſoner, and ſhewed him the ſide-board, from whence the other priſoner took the plate: then the defendant opened the door and let him out; but the defendant did not go out with him, but went to bed.

Upon the trial before Lord Chief Juſtice *Raymond*, Juſtice *Denton* and Baron *Comyns* at the *Old-Bailey*, it was doubted, whether this was burglary in the ſervant, he not going out with the other: and it being laid down in *H. P. C.* 81. *Dalt.* 317. that

it is not burglary in the servant; the Judges ordered it to be found specially. And afterwards at a meeting of all the Judges at *Serjeants'-Inn*, they were all of opinion that it was burglary in both and not to be distinguished from the case that had been often ruled and allowed in the same page in *Hale*, that if one watches at the street end while the others go in, it is burglary in all: and upon report of this opinion the next sessions the defendant was executed.

[882]

Mary Freeman alias Talbot's Case.

The justices *have power to commit to hard labour idle and disorderly persons* (1).

SHE was committed by several Justices of the peace, being taken on a general privy search, and charged on oath to be a loose, idle and disorderly person; and the commitment required her to be kept to hard labour till the first day of the next general quarter-sessions: and upon consideration of all the statutes relating to this matter, which are 39 *El. c.* 4. 1 *Jac.* 1. *c.* 7. 7 *Jac.* 1. *c.* 4. 13 & 14 *Car.* 2. *c.* 12. § 16. 11 & 12 *W.* 3. *c.* 18. 1 *Ann. c.* 13. 12 *Ann. c.* 23. the commitment was held to be good, and the prisoner remanded. *Strange pro defendente.*

(1) *Vide* 17 *Geo.* 2. *c.* 5. *s.* 4. 4 *Burn's Just.* 16. *ed.* 355. Vagrants, 4 *Com. Dig.* Justices of the Peace (B. 76.) *et seq.* 636.

Fuller *vers.* Jocelyn.

Judgment may be entered on a warrant of attorney after the death of the party (1). Cas. Temp. Hardw. 158. 2 Barn. B. R. 357, 358, 404. S. C.

LADY *Twisden* (the defendant's testatrix) 9 *February* 1729 gave a warrant of attorney to confess a judgment. 18 *April* 1730 she died, and the judgment was signed 22d of *April*, as a general judgment of *Easter* term, which began the 15th. And upon motion to set it aside, it was insisted, that by the death of the party the warrant was countermanded. 1 *Vent.* 310. *Salk.* 399. *Co. Litt.* 52. *b.* For it is considered as given only in ease of the party, to excuse her personal appearance in court, and the attorney cannot do more for her than she could for herself. And this is by relation to divest a right legally vested in the executor, who in confidence of the goods may have advanced money out of his own estate.

(1) *Chancy* v. *Needham, post.* 1081. *Robinson* v. *Tonge,* 3 *P. Wms.* 398. *Saville* v. *Wiltshire, Barnes* 271. S. P.

But

But the court said, that the case of *Oates* v. *Woodward*, *Salk.* 87. 2 *Mod. Caf.* 93 (*a*). was not to be got over; and that it being the course of the court to enter the judgments as of the first day of the term, they could not alter it on consideration of the circumstances that attend a particular case: besides this seems to be established by the statute of frauds, which provides for purchasers, but has given no remedy for this.

(*a*) Rep. also, 2 L. Raym. 766, 849. 3 Salk. 116. Holt 401.

Dominus Rex *verf.* Johannem Huggins, Arm.

THE defendant stood indicted before the justices of *oyer* and *terminer* at the *Old-Bailey*, and the indictment set forth, that *John Huggins* 1 *October* 12 *Geo.* 1. and long before, and until 1 *January* following, was warden of the *Fleet*, and had the care and custody of the prisoners committed thither. That *James Barnes* was his servant, employed by him in taking care of the prisoners. That *Barnes* being a person of a cruel nature and disposition, did 1 *November* 12 *Geo.* 1. make an assault upon *Edward Arne* then a prisoner in the *Fleet*, and feloniously took him against his will, and carried him to a new-built room in the prison, where he kept him six weeks without fire, chamber-pot or close-stool, the walls being damp and unwholesome, and the room built over the common shore. That at the time of such imprisonment *Barnes* and *Huggins* knew the room to be as before described. That *Arne* by reason of his imprisonment in the said room sickened, and by duress thereof died; and that *Huggins* was aiding and abetting *Barnes* in committing the said felony and murder.

The defendant *Huggins* only was taken, and having pleaded Not guilty, the jury find this special verdict.

That Queen *Anne* by letters patent under the great seal dated 22 *July* 12th of her reign, constituted *Huggins* warden of the *Fleet* during his life, to be executed by himself or his sufficient deputy or deputies. That from the date of the letters patent until 1 *January* 12 *Geo.* 1. the defendant was warden, and *Thomas Gibbon* all the said time his deputy, and acted as such. That *James Barnes* was the servant of *Gibbon*, and acted in the care of the prisoners, and particularly of *Edward Arne*. That *Barnes* 7 *September* 12 *Geo.* 1. assaulted *Arne*, and feloniously put into a room (which is found to be as described in the indictment) and kept him there forty-four days without fire, chamber-pot, or

If a gaoler confines his prisoner against his will in an unwholsome room without allowing him the necessaries of a chamber-pot, &c. whereby he contracts a distemper by which he dies, this is murder by duress in the party doing it. But if the verdict finds that the principal knew the condition of the room for 15 days before the death of the deceased, and that he was within that time once present "and saw the deceased under the duress of the said imprisonment and turned away," sufficients facts are not found to amount to murder. In criminal cases the principal is not answerable for the act of his deputy. The accidental presence of the principal does not revoke the power of the deputy, he must also have an intention of executing the office. *Quære*, whether a *venire de novo* can be awarded for uncertainty in a verdict in a capital case. L. Raym. 1574. 1 Barn. B. R. 358, 396. with the arguments of the counsel at *Serjeants'-Inn.* Fitzg. 177. and with the evidence. 9 St. Tr. 111.

close-stool,

close-ſtool, or ſuch like untenſil. That *Barnes* knew the room to be ſituate as in the indictment, and that it was unwholeſome; and that for fifteen days at leaſt before the death of *Arne*, *Huggins* knew the condition of the room (1), but whether he knew it before, *penitus ignorant*. That by dureſs of the impriſonment *Arne* 10 *September* became ſick, and languiſhed till 20 *October* following, upon which day he died by dureſs of the ſaid impriſonment in the ſaid room. That fifteen days at leaſt before his death *Huggins* was once preſent at the ſaid priſon, and ſaw *Arne* under dureſs of the ſaid impriſonment, and turned away, and at the ſame time he ſo turned away *Barnes* ſhut the door, and *Arne* continued in the room till he died. That during the time that *Gibbon* was deputy, *Huggins* ſometimes acted as warden. But whether he be guilty of the murder of *Edward Arne* is the doubt of the jury; on which they pray the advice of the court; *et ſi pro Rege, pro Rege*; *et ſi pro defendente, pro defendente*.

This verdict was removed at the prayer of Mr. Attorney into *B. R.* and there argued by Mr. *Willes* and Serjeant *Eyre*; after which it was argued at *Serjeants-Inn-hall* in *Chancery-lane* before
[884] all the Judges, by Serjeant *Cheſhyre*, Mr. Attorney, Mr. Solicitor, and M. *Willes*, for the King; and by Serjeant *Darnall*, Serjeant *Eyre*, Serjeant *Hawkins*, Mr. *Peere Williams*, Mr. *Strange* and Mr. *Foſter*, for the priſoner. But as every thing inſiſted on by either ſide is taken notice of in the opinion delivered by the Chief Juſtice, it will not be neceſſary to ſtate the arguments of counſel.

Raymond Chief Juſtice, after ſtating the heads of the ſpecial verdict, went on as follows. The general queſtion in this caſe is, whether upon the facts found in the verdict, the priſoner at the bar is guilty of the murder of *Edward Arne*.

For that purpoſe it will be neceſſary to conſider theſe two things: 1. What offence it is in *James Barnes*; and, 2. Whether the priſoner is guilty in the ſame degree.

1 H. H. P. C. 432. 1 Hawk. P. C. c. 31. ſect. 4. &c. 118.

And as to the firſt point we are all of opinion, that if *Barnes* was now before the court, and the facts as found in this verdict were found againſt him; he would undoubtedly be guilty of murder. It is certain, there is no particular way of killing another, that is

(1) According to the report in *Ld. Raym.* 1577. the verdict was, "that the ſaid *J. H.* knew that "the ſaid room had been then "newly built, and that the walls "of that room were made of "bricks and mortar and then "were damp."

neceſſary to conſtitute a murder; but the committing of murder is as various as the ſeveral ways of putting an end to life. In the caſe of a priſoner there is no occaſion for an actual ſtroke: the reſtraining him by force, and killing him by ill uſage, is enough to conſtitute this offence. All the authors who ſpeak of this ſpecies of murder deſcribe it by a general expreſſion, *per dure garde de ſes gardens*. The duty of a gaoler is not to puniſh, but confine the party, for the ſingle purpoſe his of being forth-coming to anſwer a legal charge or demand. *Fleta* 38. In this caſe *Barnes* has certainly exceeded his duty; he has been guilty of a breach of that truſt, which the law has repoſed in him, and is anſwerable for all the conſquences of it.

3 Inſt. 35, 91. Briton. cap. 11. ſ. 8. Cromp. 90. Bract. 105.

Another conſideration to make it murder is, that it is a deliberate act, of long continuance and of great cruelty. It is likewiſe accompanied with force, againſt the conſent of the party. On all which accounts the law implies malice. Had he therefore been before the court, there would have been no difficulty in adjudging it murder with regard to him (2).

Having thus determined what offence it would be in *Barnes*, let us now conſider how it ſtands with regard to the priſoner at the bar. And tho' the indictment has charged him equally with the other, yet we think the verdict has made a wide difference between them. The indictment charges *Barnes* to be his ſervant, but the verdict finds he was the ſervant of *Gibbon*. The whole charge in the verdict againſt the priſoner is, that for fifteen days before *Arne*'s death, he knew what ſort of room he was in: that he once ſaw him under the dureſs of impriſonment that *Barnes* had put him: and that during the time *Gibbon* was deputy, *Huggins* ſometimes acted as warden. But notwithſtanding theſe circumſtances which are found againſt the priſoner at the bar, we are all of opinion, he is not guilty of murder. [885]

It is a point not to be diſputed, but that in criminal caſes the principal is not anſwerable for the act of the deputy, as he is in civil caſes: they muſt each anſwer for their own acts, and ſtand or fall by their own behaviour. All the authors that treat of criminal proceedings, proceed on the foundation of this diſtinction; that to affect the ſuperior by the act of the deputy, there muſt be the command of the ſuperior, which is not found in this caſe.

The dureſs in this caſe conſiſted in the firſt taking him againſt his conſent, and putting him in that room, and the keeping him

(2) *Caſtell* v. *Bambridge*, *ante* 856. *Foſt. Cr. Law.* 322.

there

Ro. 3. there was no verdict, the Judge discharged the jury, and would not take their verdict, because it was put into their hands in writing as they stood at the bar. And in the case of Mr. *Keate*, 5 *Mod.* 287. *Skinner* 666 (*a*). though the verdict was so incertain, that it was impracticable to determine either way, for want of finding who struck first; yet *Holt* C. J. was so averse to a *venire facias de novo*, that he himself took an exception, that quashed the indictment, in order to put it into a proper way of being tried over again.

(*a*) Rep. also 1 L. Raym. 138. Holt 48.

But whatever may be the determination of the court, when that point comes properly before us, it is unnecessary for us now to consider (4), because as to the other point we are all of opinion, that this verdict is not incertain.

There is no incertainty as to the facts that are found: the only fault is, that there are not such facts found as will amount to murder. The consequence of which is, that the defendant is Not guilty of murder; and it would be endless to send it back to a jury, till they find facts enough to make it murder; besides its being contrary to law, in exposing a man to a second hazard of his life.

It would have been a circumstance very material in the case of *Plummer*, *Kelyng* 111. to have found, that the fuzee was discharged against the King's officers; but the jury were silent as to that, and the court said they could not take the fact to be so, upon bare evidence of the fact; and proceeded to give judgment, as if the fuzee had not been discharged against the King's officers, without sending it back to the jury to find it positively one way or the other.

Vide post. 1018.

So in the case of *Messenger et al'* (*Kelyng* 79.) who were indicted for high treason in assembling and pulling down bawdy-houses. [888] The verdict was silent as to *Green* and *Bedell*, whether they were aiding and assisting; and this (says *Kelyng*) being a matter of fact, which ought to be expresly found by the jury, and not be left to the court upon any colourable implication from their being present; they two were discharged, without sending it back to the jury for their further opinion as to the fact.

(4) According to the report in *Barnard.* 398. *Ld. Raymond* is made to say, "that all the Judges "had delivered their several "thoughts to be, that if the "verdict had been uncertain a "*venire de novo* would not have "lain." But all the other reports concur with the present, that they gave no opinion upon the point.

In

In *Kelyng* 66. on a ſpecial verdict it was found, that *Thompſon* and his wife were fighting, and *Dawes* endeavouring to part them was killed by *Thompſon*: and it not being found, that *Thompſon* knew *Dawes* intended only to part them, it was held manſlaughter, without ſending it back to the jury to be certified of his knowledge.

Theſe are caſes directly in point as to this head; and I muſt obſerve that *Plummer*'s caſe was after the caſe of *Keate*, wherein *Holt* Chief Juſtice had this point under his conſideration.

This verdict therefore being ſufficient to found a judgment upon, our judgment is, that the priſoner is Not guilty, and therefore he muſt be diſcharged.

Hilary Term

4 Georgii 2 Regis. In B. R.

Robert Lord Raymond, *Lord Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq*;

Sir Philip Yorke, *Knt. Attorney General.*
Charles Talbot, *Esq*; *Solicitor General.*

Da Costa *verf.* Carteret et al'.

Not guilty and the ftatute of limitations pleadable.
Fitzg. 189.
1 Barn. B. R. 407, 412. S. C.
Ante 678.

THE Common Pleas having laft term determined, that *non affumpfit*, and *non affumpfit infra fex annos* fhould not be pleaded, becaufe the latter puts all in iffue, and does not imply a promife without the fix years; it came now to be folemnly debated in this court, *Strange* having moved for leave to plead Not guilty and the ftatute of limitations. And the court granted it for this reafon, becaufe thereby the defendant fecured to himfelf a trial upon the merits in all events, whereas if he was to to reft only on the *non affumpfit infra fex annos*, it might come to a demurrer, or the iffue of *nul tiel record* (1).

(1) *Vide Cox* v. *Rolt*, 2 *Wilf.* 253.

Willams *verſ.* Ogle.

UPON the iſſue of *nul tiel record*, one was *Segrave* and the other *Seagrave*, and the court held it no variance, *quia idem ſonans*. *Qu. tamen*, where the party has ſomething elſe to go by than the ſound.

Variance. Vide ante 201, 231, 787. Doug. 194. 6 Com. Dig. Record. (C.) (D.) 173.

[890]

Leapidge et al' *verſ.* Pongillionne.

IN debt *ſur emiſſet* for goods ſold, the court refuſed to let the defendant bring money into court, ſaying they never did in debt (1). *Strange pro quer'.*

No bringing money into court in debt. 1 Barn. B. R. 420. S. C.

(1) In the report in *Barnard.* the court granted a rule to ſhew cauſe; and in debt wherever the ſum that the plaintiff can take out execution for is capable of being aſcertained by mere computation, money may be paid into court as in debt for rent, &c. *Vide Hallet* v. *Eaſt India Company*, 2 *Burr.* 1120. and the caſes collected, 1 *Cromp. Pract.* 150. *Imp. Pract. K. B.* 256.

Dimmock *verſ.* Chandler.

A Prohibition was moved for to the Admiralty in a ſuit there brought by one part-owner againſt the other, who would go to ſea with the ſhip, in order to oblige him to give ſecurity. And *Carth.* 26. *Hardr.* 473. were cited. But the court ſaid, thoſe caſes were denied, 7 *Ann. Grave* v. *Hedges*, (*a*), and that if ſecurity was offered and refuſed, they would grant a prohibition; but not before (1).

Admiralty. Fitzg. 197. 1 Barn. B. R. 415. S. C.

(*a*) Holt 470.

(1) *Lambert* v. *Aeretree*, 1 *Ld. Raym.* 223. *Blackett* v. *Aſley*, *Ib.* 235. *De Grave* v. *Hedges*, 2 *Ld. Raym.* 1285. *Quære*, if not S. C. cited *ſupra*. *Ouſton* v. *Hebden*, 1 *Wilſ.* 101. 1 *Com. Dig.* Admiralty (F. 1) 394.

Doldern *verſ.* Feaſt.

PER *curiam*, We have ſeen ſo much oppreſſion in letting the ſheriff's officers be bail, that we think proper to concur with the Common Pleas in a general rule, not to accept them or ſerjeants at mace (1).

Sheriff's officers ought not to be bail. 1 Barn. B. R. 417. S. C.

(1) R. M. 14 *Geo.* 2. *Reg.* 2. *Bolland* v. *Pritchard*, In *C. B.* 2 *Black.* 799. *Lofft.* 153. This rule extends to the Keeper of the *Poultry Compter*, *Hawkins* v. *Magnall*, *Doug.* 466.

The Executors of the Duke of Marlborough *against* Widmore.

Amendment. Fitzg. 193. better reported 1 Barn. B. R. 408, 418. S. C.

THE plaintiffs declared as executors on a promife to their teftator; and iffue was joined on a plea of the ftatute of limitations. Then the plaintiffs moved to amend, by laying the promife to have been made to themfelves; and cited 3 *Lev.* 347. where in an action upon the ftatute of hue and cry the allegation of the oath was amended, and laid to be by the fervant inftead of the mafter.

And on the authority of this cafe the court ordered the amendment, on payment of cofts and liberty for the defendant to plead *de novo* (1). *Strange pro def'.*

(1) Otherwife the ftatute of limitations could have barred the action. *Vide Nifbett* v. *Griffith*, *Say.* 97. *Aubeer* v. *Barker*, 1 *Wilf.* 149. Upon which ground the court gave leave to amend an information for killing a hare, by altering the parifh where the offence was laid, becaufe the three months within which it muft be filed were elapfed. *Howell qui tam* v. *James*, *B. R.* 1 *Wilf.* 163. But in *Geff. qui tam* v. *Popplewell*, 2 *Term. Rep.* 707. *where a qui tam action had depended four years*, the court refufed to allow the plaintiff to amend his declaration though the pleadings were in paper, becaufe it would in effect amount to a permiffion to bring another action to which the defendant might otherwife plead the ftatute of limitations. *Vide* alfo *Doe* v. *Pilkington* 4 *Burr.* 2447.

[891]

Butler *verf.* Inneys et ux'.

Pauper.

THE plaintiff fued as a *pauper*, and was nonfuited; after which he brought a fecond action, and recovered. And *Strange* moved on behalf of the defendants, that the cofts in the firft action might be deducted out of the recovery in the fecond, but it was refufed.

Vice *verf.* Burton.

Mefuagium five tenementum is well enough in trefpafs. Ante 834.

IN trefpafs for *mefne* profits, the declaration was for an entry into *mefuagium five tenementum.* And on error it was objected to for the uncertainty; and a cafe cited, where it had been held ill in ejectment. To which it was anfwered, and refolved by the court, that there was a very effential difference; becaufe in ejectment it will be uncertain, of what the fheriff is to deliver

deliver the possession. So the plaintiff in error went over to an exception to the writ of error, which was quashed, being returnable before judgment.

Dominus Rex *vers.* Bettesworth.

MANDAMUS to grant administration to *John Cullom*, of *Joan* his wife. Return, that by articles before marriage it was agreed, that the wife should have power to make a will, and dispose of her leasehold estate; that pursuant to this power, she made a will, and her mother executrix, who has duly proved the same.

Though a feme has power to make a will, yet the baron shall have administration. 1 Barn. B. R. 324. S. C. But no judgment MSS. 37. S. C. 1 Mod. 211.

To this return it was objected, that she might have *choses en action* not covered by the deed, and the husband was in all events intitled to an administration *quoad* them.

E contra it was insisted, that with the consent of the husband she might make a will. 2 *Mod.* 170. And here is his consent by being party to the deed.

Sed per curiam, A general consent to make a will does not seem sufficient, but there should be a consent to that particular will; besides, this is going beyond her power, which did not extend to the making an executor. This is rather an appointment, which in equity will controul the administration as to the leasehold estate, than a will; and as there may be other effects not covered by the deed (1) the return is ill, and there must be a peremptory *mandamus*.

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(1) *Vide Rex* v. *Bettesworth, post.* 1118. and *Rex* v. *Bettesworth, post.* 1111.

Smith's Case. [892]

MR. *Reeve* moved for a *mandamus* to Dr. *Bettesworth*, commanding him to grant administration to *Smith* of the goods of his deceased son, *durante minori ætate* of his grandson.

Mandamus lies not for an administrator *durante minori ætate*. 1 Barn. B. R. 370, 425. Fitzg. 163. Cit. And. 366. 3 Bac. Abr. 535. MSS. S. C.

Fazakerley contra insisted, that the father has not an equal right with the son; and that the spiritual court has always considered these administrators only as trustees for the infant, and have never kept to any rule in granting them, but according to the circumstances of the family; where there are several in equal

4 Bew 361.

degree, as children, they have always chosen which they pleased.

Et per curiam, When we grant *mandamus's*, it is to oblige the judge to do right to the party who sues the writ; but as there is no law which says to whom these administrations during minority shall be granted, there is no law to be put in execution. (1). In the case of the next of kin he is intitled *de jure*, and therefore in his case we grant a *mandamus* of course (2). We will grant no writ in this case.

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(1) *Anon. And.* 24 S. P. *Vide Rex* v. *Bettesworth*, *post*. 936.

(2) *Anon. ante* 552.

Baynes *verf.* Forrest.

Variance. 1 Barn. B. R. 428 S. C 6 Com. Dig. Record (C.) 173.

UPON the issue of *nul tiel record*, the *scire facias* recited a judgment for damages *pro non performatione cujusdam promissionis et assumptionis*: and on producing the record it was *several* promises, and intire damages. And the court held it a variance; and the plaintiff quashed his *scire facias* with costs, the court refusing to amend it.

The Sword-blade Company *verf.* Dempsey.

Amendment of writ of error. Fitzg. 201 1 Barn. B. R. 405, 421. S. C.

AN ejectment was brought against the Company and Mr. *Edwards*. After a verdict for the plaintiff, Mr. *Edwards* died, and a writ of error is brought laying the judgment to be *ad grave damnum* of the Company, and of *Mary Edwards* the daughter and heir. And she and the Company jointly assign errors.

It was moved to amend the writ and assignment, by striking out her name. And upon consideration the court were of opinion, that it was amendable by the statute 5 *Geo.* 1. *c.* 13. not only as a *variance* from the original record, which is really no way to the damage of *Mary Edwards*, but also by virtue of the general words *other defect* (1).

Vide post. 973.

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(1) *Vide Verelst* and *Smith* v. *Rafael*, *Cowp.* 425.

Symes *verſ.* Oakes.

Shepherd *verſ.* Oakes.

Lavender *verſ.* Oakes.

ON error *e C. B.* in actions of debt on bail bonds, it was excepted by *Filmer*, that it was not ſhewn, that the bonds were to the ſheriff by the name of office, as the ſtatute 23 *H.* 6. *c.* 10. requires. And the court held, that it ſhould ſo appear (1); but they thought it did ſufficiently appear on the whole declaration, they being laid *ſolvend' eidem vicecomiti et aſſignatis. Strange pro quer'.* Judgment affirmed.

What amounts to ſhewing a bond taken by the name of office.

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(1) 2 *Jones* 138.

Dominus Rex *verſ.* Ward.

MANDAMUS to admit *Henry Dryden* to be deputy regiſter of the archbiſhop of *York*'s court, ſuggeſting that Dr. *Thomas Sharpe* had been admitted to the office, to execute the ſame by himſelf or his deputy, that he had appointed *Dryden* (who is averred to be a fit perſon) to be his deputy, whom the commiſſary had refuſed to admit, to the great damage of Dr. *Sharpe* who complains, and therefore the writ commands the commiſſary to admit and ſwear *Dryden*, or ſhew cauſe to the contrary. To this the commiſſary returns, that long before the conſtituting *Dryden* to be deputy, *John Sharpe* and *Thomas Sharpe* were admitted into the office as principals, to hold for their lives, and the life of the ſurvivor. That they 11 *March* 1714, appointed *John Shaw* to be their deputy, who executed the office till *John Sharpe* died. That *Thomas Sharpe* ſurvived, and 12 *May* 1727, by a new appointment conſtituted *Shaw* his deputy, who was admitted and executed the office, until ſuſpended in the manner after mentioned. That *Shaw* at the times of his admiſſion took an oath that he would juſtly and honeſtly execute the office without favour or reward, and do every thing incumbent on the office, and not be an exactor or greedy of rewards. That by the canons of 1603, it is (*inter alia*) ordained, that if any regiſter or his deputy ſhould receive any certificate without the knowledge or conſent of the judge, or omit to call over any perſon cited to appear, or put off the examination of witneſſes, or diſobey the judge, or omit to enter the decrees before the next court day, or not regiſter wills within a convenient time,

Mandamus lies for the principal regiſter of the Archbiſhop's court to admit and ſwear his deputy, but it will not lie for the deputy himſelf, he being an officer at will. It lies notwithſtanding that this is a ſpiritual office. The writ need not aver that the perſon to whom it is directed, is the perſon to whom it appertains to admit and ſwear. Fitzg. 1[illegible]. 194. 1 Barn. B. R. 2[illegible]. 294. 380. [illegible]11. 3 B[illegible]. Abr. 531. S. C. MSS. S. C.

time, or enact any thing falfe, or of his own conceit, in the decrees, or take any reward from either party, or be of counfel with them, or do any thing that may fcandalize the judge; then fuch regifter or his deputy may be fufpended by the bifhop for the fpace of one, two or three months, or more, according to the degree of his offence, and the bifhop fhall appoint fome other publick notary to execute the office during the fufpenfion. That whilft *Shaw* was deputy, feveral proctors of the court 16 *February* 1727, exhibited to the commiffary feveral articles againft him (which are fet out *in hæc verba*) complaining of divers mifbehaviours in his office, contrary to feveral of the particulars fet forth in the canons. That *Shaw* being fummoned 6 *April* 1728, gave in his anfwer in writing (which is fet forth) and then the return goes on with a *quia videbatur* to the commiffary, that the anfwer was infufficient, and that *Shaw* had confeffed himfelf guilty of feveral omiffions and extorfions in the exercife of his office; therefore upon complaint thereof to the archbifhop, he 21 *May* 1728, by his commiffion under his archiepifcopal feal directed to the commiffary, and reciting that *Shaw* had been guilty in the manner before mentioned, he therefore impowers the commiffary to fufpend him and affume another notary publick. That by virtue hereof he, 24 *May* 1728, fufpended *Shaw* for five years, and affumed *Jofeph Leech* a notary publick, who before the conftituting *Dryden* to be deputy took upon him, and has ever fince exercifed the office. That *Shaw* appealed, and in that appeal alleged, that 23 *May* 1728, he refigned the office, and that Dr. *Sharpe* had appointed *William Smith* to be deputy. That delegates were appointed, who 23 *October* 1728, iffued an inhibition to the commiffary, that pending the appeal he fhould do nothing to the prejudice of the appellant. That the appeal remains undetermined, and for thefe reafons he cannot admit *Dryden* to be the deputy of Dr. *Sharpe*.

Strange argued that the return was ill, and there ought to be a peremptory *mandamus*.

I muft obferve in general, that there is no incapacity returned in *Dryden*, no want of any regular appointment or deputation; on the contrary it appears that Dr. *Sharpe* had a power to make a deputy, and that he has executed it with regard to Mr. *Dryden*. As therefore *Dryden* has *prima facie* a regular title to the office, the commiffary who is to admit him ought not to refufe to do his duty; efpecially confidering that the admiffion gives no right, but only a legal poffeffion, to enable him to affert his right, if he has any. And upon this foundation it is, that *non fuit electus* has been held no good return to a *mandamus* to fwear in a church-

Ante 538. 3 Burr 1266.

churchwarden (*Mich.* 11 *Geo. Rex* v. *White*) (*a*) becaufe it is directed only to a minifterial officer, who is to do his duty, and no inconvenience can follow; for if the party has a right, he ought to be admitted, if he has not, the admiffion will do him no good. This effect of a *mandamus* to admit, was laid down in the cafe of the King againft the Dean and Chapter of *Dublin*, *Hil.* 7 *Geo.* which was a *mandamus* to admit one *Dougate* to his feat in the choir and his voice in the chapter. Wherever the officer is but minifterial, he is to execute his part, let the confequence be what it will. *Mich.* 11 *Geo. Rex* v. *Simpfon.* That was a *mandamus* to the archdeacon of *Colchefter*, to fwear *Rodney Fane* into the office of churchwarden. The archdeacon returned, that before the coming of the writ he received an inhibition from the bifhop; but the court held that was no excufe, and that a minifterial officer is to do his duty, whether the act would be of any validity or not. In the cafe of *Taylor* v. *Raymond*, *Mich.* 4 *Geo.* to a *mandamus* to fwear in a churchwarden, it was returned, that before the coming of the writ he had fworn in another; and held an ill return, for be the right which way it will, the officer is to do his duty. Thefe cafes are both in point: in one there was an inhibition (as there is in this cafe) and in the other there was another officer, as they pretend there is here, viz. *Jofeph Leech.*

(*a*) 2 Ld. Raym. 1379. 8 Mod. 325. S. C. Barnard. K. B. 381.

[895]

Ante 536.

Ante 609.

But what is that inhibition? it is to do nothing that may prejudice the appeal. Can this hurt *Shaw?* no: if he is relieved on the appeal, he will be reftored, though another is admitted. If he is not relieved, it muft be for want of a right, and he will not be capable of fuffering any prejudice by the other's admiffion. But what takes off all pretence of the inhibition's being material in this cafe is, that it appears by *Shaw*'s own fhewing, that he had the day before his fufpenfion furrendered his deputation; and that accounts for the laft part of the return, that the appeal is undetermined, it not being of any confequence to *Shaw* to profecute it any further. Befides, this would be to deprive Dr. *Sharpe* of the benefit of this office as long as *Shaw* fhall think fit to fleep upon the appeal; Dr. *Sharpe* having no power to expedite the determination.

A deputy is but at will, and this is to deprive Dr. *Sharpe* of his will for five years, which fufpenfion I take to be illegal, for the words *or more* which are added in the canon, muft have a reafonable conftruction, and can never be extended to five years. *Shaw* is intirely divefted of the office, which anfwers the purpofe of reformation better than a bare fufpenfion. As therefore the office is vacant, there can be no reafon why the com-

miffary fhould refufe to fill it up, and a peremptory *mandamus* ought to go.

L. Raym. 1405. 8 Mod. 380. 1 Burr. B. R. 411. S. C. 12 Mod. 2, 3. Ante 625. [896]

Filmer contra. The cafes of churchwardens have been denied; and it has been fince determined in *The King* v. *Harwood*, that *non fuit electus* is a good return (1): and *Pafch.* 11 *Geo. Rex* v. *Pender*, it was held a good retnrn, that the party praying the *mandamus* had had judgment of *oufter* againft him in an information in the nature of a *quo warranto*. The principal ought to fuffer in fome degree for the faults of his deputy, nor ought the principal to defeat the punifhment of his deputy by accepting a furrender of the deputation.

Sed per curiam, Surely it is attempting too much, to fupport this as a good return: the effect of a *mandamus* as laid down is certainly fo; that it gives no right. The canon only intended, that the bifhop fhould fufpend, where the principal would not revoke; but an actual revocation is better than a fufpenfion. It would be carrying the power of inhibitions a great way, if we fhould allow it the force contended for by the return: we are therefore all of opinion the return is ill.

Then *Filmer* took exceptions to the writ. 1. That a *mandamus* would not lie for a deputy. 2. Nor for a fpiritual office as this is; and 3. It is not averred in the writ, that Dr. *Ward*, to whom it is directed, is the perfon bound to admit and fwear.

1. As to the firft objection he cited 6 *Mod.* 18. where *Holt* C. J. lays it down, that a *mandamus* will not lie for a deputy.

2. As to the fecond he cited 3 *Mod.* 322. *Carth.* 169. 3 *Lev.* 309. *Show.* 217. that a *mandamus* will not lie for a proctor, who belongs as much to the ecclefiaftical court as the regifter.

3. It is the conftant form to allege, that the party to whom the writ is directed, is the perfon to whom it appertains to fwear and admit. *Trem. Ent.* 452.

Strange contra. To the firft objection, this is not a *mandamus* for the deputy, but for the principal to be admitted to have a deputy: the refufal of *Dryden* is laid to be *ad grave damnum* of Dr. *Sharpe*, *ficut ex querela fua accepimus*, and therefore to do him (Dr. *Sharpe*) right in the premiffes, is the writ awarded. It appears

(1) *Regina* v. *Twitty*, *Salk.* 433. *Rex* v *Rice*, 1 *Ld. Raym.* 1138. *Regina* v. *Gaife*, 2 *Ld. Raym.* 1008. *Rex* v. *White*, *ib.* 1379. *Rex* v. *Doctor Harris*, 3 *Burr.* 1420. *Rex* v. *Penrice*, *poft.* 1235.

pears Dr. *Sharpe* has a freehold in the office, so though his deputy is but at will, *he* has it for life. 1 *Vent.* 110. a *mandamus* was granted to restore *A.* to the office of deputy steward of the court of the council of Marches. And it was held to lie for a [illegible] deputy, because the principal has no other way to get him admitted. And in the report of the same case in 1 *Lev.* 306. it is said *per curiam*, Though a *mandamus* does not lie for a deputy, yet it lies for him who deputes him, to have him admitted or restored; for otherwise he may be deprived of his power to make a deputy.

2. As to the nature of the office. Its being an office subject to the ecclesiastical court is no objection. *Trin.* 3 *Geo.* 1. *Rex* v. *Ballivos de Morpeth.* A *mandamus* to admit an under school-master; and yet school-masters are within 77 and 79 canons of 1603. as well as registers. So in the case of Mr. *Folkes* lately, for the office of apparitor general of the Archbishop of *Canterbury.* It has been often granted for a sexton and parish clerk. 1 *Vent.* 143. *Hil.* 4 *Geo. Davis's* case for a parish clerk. And the same term *Rex* v. *Parochian' de Thame* for a sexton, *Trin.* 9 *Geo.* to restore Dr. *Bentley* to the degrees of batchelor of arts and doctor of divinity. And Dr. *Sherlock's* case, to admit him a prebend of *Norwich*, *Trin.* 4 *Geo.* And *Dougate's* case before cited.

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Ante 58.

Ante 115.

Ante 557.

Ante 159. Ruding v. Newell, post. 983.

No assize will lie for this office; so if the party has not this remedy, he has none. The reason why it was refused to a proctor was, because it did not appear what interest he had, but here appears a freehold. *Carth.* 170. is a *mandamus* to admit a register of an archdeacon of *Sarum.* And *Trem.* 536. for the like at *Exon.*

3. If Dr. *Ward* was not the person to whom the executing this writ belongs, he should have returned so, (*Trem.* 453.) but instead of that he is making an excuse; besides, it is laid that *minus rite* he refuses, which is an averment that in justice *he* ought to do it. And as to precedents, they are both ways. *Tremayne* 450. 461. 465. 483. and several precedents were produced from the rolls. *Mich.* 2 *Ann. rot.* 61. *Trin.* 3 *Ann. rot.* 35. *Hill.* 22 *Car.* 2. *rot.* 218.

Vide Rex v. Wigan, 2 Burr. 782. that it is at the peril of him who sues out the writ to direct it to the person proper to execute it.

Et per curiam, We all think this writ is good, notwithstanding the exceptions that have been taken, and therefore a peremptory *mandamus* must go (2).

(2) The court here permitted the party, after making a return, to object to the writ. *Et vide Rex* v. *College of Physicians*, 3 *Burr.* 2740. when the writ was quashed after a return made. But in *Rex* v. *Mayor of York*, 5 *Term Rep.* 74. the court held, that the party by making a return had precluded himself from objecting to the writ; and see the cases *contra* cited *ib.* in the note.

Easter Term

4 Georgii 2. Regis. In B. R.

Robert *Lord* Raymond, *Lord Chief Justice*,

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq*;

Sir Philip Yorke, *Knt.* *Attorney General*,

Charles Talbot, *Esq.* *Solicitor General.*

Harman *verf.* Delany.

What a libel, actionable. Fitzg. 121. 253. 1 Barn. B. R. 289. 438 S. C. 4 Com. Dig. Libel, (A. 3.) 715.

IN an action upon the cafe for a libel, the plaintiff declared, that he was gunfmith to his Royal Highnefs the Prince of *Wales*, and that it having been inferted in the *Craftfman*, that he had had the honour to prefent him a gun of two feet fix inches long, which would fhoot as far as one of a foot longer, and had kiffed the Prince's hand on being appointed his gunfmith; the defendant, intending to fcandalize him in his trade, publifhed an advertifement in thefe words, "Whereas there was an "account in the *Craftman* of *John Harman* gunfmith making "guns of two feet fix inches to exceed any made by others of a "foot longer, (with whom it is fuppofed he is in fee) this is to "advife all gentlemen to be cautious, the faid gunfmith not "daring to engage with any artift in town, nor ever did make "fuch an experiment, (except out of a leather gun) as any gen-"tleman may be fatisfied of at the *Crofs Guns* in *Longacre*." After Not guilty pleaded, there was a verdict for the plaintiff and 50*l.* damages.

It

It was moved in arrest of judgment, that this is no libel, and that if one tradesman will pretend to be a greater artist than others, it is lawful for them to support their own credit in the same way.

Et per curiam, That is certainly so, and if the defendant had gone no farther he would not have been chargeable; they might advertise that they make as good as he, but they ought not to say he is no artist, which they plainly do by saying he dares not engage with any artist, and by advising gentlemen to be cautious of him: the law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action, that will not be actionable in the case of another person: and if bare words are so, it will be stronger in the case of a libel in a publick news-paper, which is so diffusive. 1 *Mod.* 19. 1 *Roll. Abr.* 63. *pl.* 30. *Cro. El.* 343. 1 *Roll. Abr.* 62. *pl.* 28. *Hetley* 71. *Brownl.* 151. 2 *Mod.* 118. 5 *Co.* 125. *Hard.* 470. 1 *Keb.* 293. 1 *Roll. Abr.* 37. *pl.* 15. *Skinner* 123. *Hob.* 225. *Mo.* 627. 2 *And.* 40. *Hutt.* 125.

The plaintiff had judgment, the court being of opinion, that it tended to discredit him in his business.

Medlicot's Case. In Canc.

A Commission of bankruptcy was superseded, because granted upon the petition of an assignee of a bond; who though he is an equitable, yet is no legal creditor (1).

Assignee of a bond cannot petition for a commission of bankruptcy. Cas. temp. King C. &c. 6.

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(1) *Ex parte Hylliard*, 1 *Atk.* 147. 2 *Vez.* 407. *Ex parte Lee*, 1 *P. Wms.* 782.

Seymour, Bart. qui tam *verf.* Day.

THE action was for the penalty in killing a hare, not being qualified. And the jury found for the defendant, contrary to the direction of the Judge. But the court refused a new trial, saying it had never been carried so far as a penal action (1).

No new trial in a *qui tam* after verdict *pro def.*

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(1) *Vide Mattison qui tam* v. *Allanson, post.* 1238. But note, they will grant one where the whole merits of the case have not been laid before the jury, either through the mistake or mis-direction of the Judge. *Wilson* v. *Rastall*, 4 *Term Rep.* 758. *Vide* the cases there cited, and 5 *Com. Dig. Pleader*, (R. 17.) 502.

Moore *verſ.* Goodright.

Aſſigning for error the death of the plaintiff in ejectment is a contempt (1).

UPON a writ of error *coram vobis*, it was aſſigned for error, that the plaintiff in the ejectment died before the day of *niſi prius*. And it being in ejectment, the court ſet it aſide, and ordered the attorney to ſhew cauſe, why there ſhould not be an attachment againſt him; for they ſaid it was to defeat the

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proceedings inſtituted by the court to try the right; and every body knows that the plaintiff is but nominal, or if a real perſon, yet his releaſe is a contempt.

(1) *Vide Rex* v. *Burridge*, *ante* 593.

Goodtitle *verſ.* Holdfaſt.

Practice. 8 Mod. 345. 10 Mod. 383.

AFTER judgment againſt the caſual ejector, and before any writ of poſſeſſion executed, the court made a rule to ſtay proceedings on payment of all rent due and coſts: it not being pretended that the ejectment was brought on any other title, than a re-entry for non-payment of rent.

Dominus Rex *verſ.* Catherall.

3 & 4 W. & M. c. 12. 8 & 9 W. 3. c. 37. In convictions for non-payment of money the ſum muſt be mentioned. Fitzg. 266. 1 Barn. B. R. 427. 442. S. C. Vide ante 497. 2 Ld. Raym. 900.

THE defendant was convicted on the *Kenſington* turnpike act for refuſing to account and pay over the money by him received as collector. And being committed, and a *habeas corpus* brought, the defendant was diſcharged, and the conviction quaſhed; becauſe no particular ſum was ſpecified, or the times when the money was charged to be received, ſo as to enable him to defend himſelf on a ſecond charge. And though the counſel for the truſtees would have had the commitment ſtand good as to the not accounting; yet the court ſaid it was one intire non-feazance charged both in the conviction and commitment, and they would not ſever them (1). The defendant was diſcharged, and the conviction quaſhed (2).

(1) *Vide Rex* v. *Hale*, *Cowp.* 728.

(2) From the other reports of this caſe it appears, that the counſel for the truſtees applied for leave to amend the conviction, but being filed, it was refuſed.

Dominus Rex *verſ.* Inhabitantes de Hamworth in com' Staff'.

Certiorari may be granted where private perſons are charged to repair a bridges 1 Seſſ. Ca. p. 415. No. 329. 1 Barn. B. R. 445. S. C.

UPON motion to quaſh a *certiorari* to remove an indictment againſt the defendants at ſeſſions, for not repairing a bridge, it was inſiſted, that by 1 *Ann. c.* 18. the *certiorari* is taken away. To which it was anſwered, and reſolved by the court, that this act extended only to bridges where the county is charged to repair; and that where a private perſon or pariſh is charged, and the right will come in queſtion, the act 5 & 6 *W.* & *M. c.* 11. had allowed the granting a *certiorari*. And therefore they refuſed to quaſh (1).

(1) And according to 1 *Seſſ. Ca.* 415. the indictment was afterwards quaſhed, the charge being laid by way of recital, and not poſitively. *Vide* 2 *Hawk. P.C.* 25. *ſect.* 60. *p.* 323.

Dominus Rex *verſ.* Stoughton.

Levavit vel levari cauſavit, ill. 2 Seſſ. Ca. p. 25. No. 30. 1 Barn. B. R. 347. 425.

INDICTMENT againſt defendant for a nuſance, charging that he *ſepem levavit vel levari cauſavit.* And on demurrer judgment was given for the defendant, on account of the incertainty of the charge. *Vide Rex* v. *Stocker* in *Salk.* 342. 371. and 5 *Mod.* 137. (1).

(1) *Rex* v. *Flint, B. R. Caſ. temp. Hard.* 370. 2 *Hawk. P. C. ch.* 25. *ſect.* 58. *p.* 321. 4 *Com. Dig. Indictment,* (G. 3.) 394.

Dominus Rex *verſ.* Morris.

The jury muſt appear to be ſworn in the county. Fitzg. 266. 1 Barn. B. R. 443. S. C.

AFTER conviction on an indictment the judgment was arreſted, becauſe the words *adtunc et ibidem* were left out as to the ſwearing of the jury. 1 *Mod.* 26. 1 *Vent.* 60. 2 *Keb.* 513. 610.

Cooke qui tam *verſ.* Champneys.

Action upon the caſe lies for the eſcape of an outlaw Fitzg. 265. 1 Barn. R. R. 454. S. C.

IN an action for the eſcape of *Sarah Chatford*, who was taken upon an outlawry on *meſne* proceſs; *Gapper* moved in arreſt of judgment, that the action would not lie, for the plaintiff is at the end of his ſuit, and the King only has an intereſt for the for-

forfeiture, and the body is kept for the contempt; and cited *Cro. El.* 706. 13 *H.* 4. 1. *Salk.* 80.

Draper contra. The case in *Cro.* is of debt on the statute of *R.* 2. But it was never doubted but case would lie. *Cro. El.* 652. *Cro. Jac.* 360. It will lie for the escape of one taken on an *excommunicato capiendo. Lutw.* 122. 2 *Bulst.* 236. 1 *Roll. Rep.* 47. *Mo.* 834. So for the escape of one committed by commissioners of bankruptcy.

Yelv. 20.

Et per curiam, He may never be taken again, and the confinement would have enforced his appearing to the action, to reverse the outlawry: so the plaintiff has an interest and a damage, and must have judgment.

Dominus Rex *vers.* Japhet Crooke.

Indictment of forgery on 5 El. c. 14. that A. being seised of *Jawick*, the defendant forged a conveyance of *Jawick park*, for a forgery with intent to charge is within that act. Fitzg. 57. 261. more full. 1 Barn. B. R. 168. 441. 461. S. C. Vide 1 Hawk. P. C. ch. 76. sect. 12. 339. 2 Bac. Abr. 571.

THE defendant was convicted on the statute 5 *Eliz. c.* 14. for forging a lease and release. And the indictment sets forth that *Garbut et uxor* were seised in fee of certain messuages, lands and tenements called *Jawick* in the parish of *Clackton* in *Essex*, and that the defendant intending to molest them and their interest in the premisses, forged a lease and release as from *Garbut et ux'*, whereby they are supposed for a valuable consideration to convey to him "all that park called *Jawick Park*, in the parish "of *Clackton* in *Essex*, containing eight miles in circumference, "with all the deer, woods, *&c.* thereto belonging."

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*After verdict *pro rege*, it was moved in arrest of judgment, that the premisses supposed to be conveyed were so materially different from those which were really the estate of *Garbut et ux'*, which was houses, lands, and tenements; that it was impossible this conveyance ever could molest or disturb them: if it was a true deed, it could not pass their lands at law for want of a proper description; and though where lands are improperly described, a court of equity will oblige the vendor to convey them by proper words; yet that is only where there is a previous contract for a sale, and they do it as carrying that contract into execution; whereas here is no contract, and the case is no more, than if *A.* had been seised of *Blackacre*, and *B.* had forged a conveyance of *Whiteacre*, which certainly would not be within the statute.

The court for several terms inclined strongly with the objection: but this term the Chief Justice declared that they were all of opinion to over-rule it: the words of the act are, "to the "intent

"intent that the state of freehold or inheritance of any person "to any lands, &c. or the right or title of, in and to the same, "shall or may be molested, troubled, defeated, recovered or "charged." By this it appears, that it is not necessary, there should be a charge or a possibility of a charge; it is sufficient that it be done with that intent, and the jury have found that it was done with intent to molest *Garbut* and his wife in the possession of their lands. Accordingly judgment was given for the King, and the defendant had sentence to undergo the punishment appointed by the act for forging a deed, and the same was executed upon him at *Charing Cross*.

Gardner *verſ.* Merrett.

THERE was a variance between the writ of error and the record; and as it stood in the paper, the court observed it, but neither party would move to amend it, for fear of paying costs: upon which the court said the statute 5 *Geo.* 1. *c.* 13. would warrant their amending it, which they did without costs.

5 Geo. 1. c. 13. The court may *ex officio* amend a writ of error. 1 Barn. B. R. 462. Fitzg. 268. L. Raym. 1587. S. C.

Regula generalis.

THE court taking notice of great inconveniences following from holding a warrant to confess judgment by one in custody to be good, if any attorney (though for the opposite party) was present; made a rule, that for the future there should be an attorney present on the behalf of the defendant (1).

No warrant of attorney from a prisoner good but where there is an attorney *pro def'* present.

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(1) Similar rule in *C. B. Reg.* 14 *Geo.* 2. But this rule extends only to cases where the party is in custody upon mesne process. *Watkins* v. *Hanbury*, *post.* 1245. *Fell* v. *Riley*, *Cowp.* 281. *Birch* v. *Sharland*, 1 *Term Rep.* 715. and at the suit of the party for whom the warrant to confess judgment is given. *Finn* v. *Hutchinson*, 2 *Ld. Raym.* 797. *Holcombe* v. *Wade*, 3 *Burr.* 1792. In *Gillman* v. *Hill*, *Cowp.* 142. *Charlton* v. *Fletcher*, 4 *Term Rep.* 233. And it does not include the case of prisoners in custody of the marshall. *Parkinson* v. *Caines*, 3 *Term Rep.* 616. Neither does it extend to cases where the defendant is himself a practising attorney. *Walton* v. *Stanton*, *Barnes* 37. or where being acquainted with the rule, the defendant means to convert it into an instrument of fraud. *Gillman* v. *Hill*, *Cowp.* 141. But within these exceptions it must be complied with in all cases. *Woodin* v. *College*, *Ann.* 177. even though the warrant be executed out of *England*. *Fitzgerald* v. *Plunket*, *post.* 1247. But even in cases not strictly within the

the rule, if the defendant has been oppressed or imposed upon, in consequence of such a warrant signed without the presence of an attorney acting for him. Both courts will relieve him from the judgment. *Ruffle* v. *Hitchacock*, 2 *Black. Rep.* 1097. in *C. B. Warraker* v. *Gascoyne*, *ib.* 1297. *Parkinson* v. *Caines*, 3 *Term Rep.* 616. in *B. R.*

[903]

Philips *verſ.* Knightley.

Award that *A.* ſhall execute a covenant to indemnify *B.* is good. Fitzg. 53. but not S. P. Ib. 167. 279. S. P. 1 Barn. B. R. 84, 151. but not S. P. Ib. 387. 457. 463. S. C. S. P.

IN debt on an arbitration bond. It appeared that the award was, that the defendant ſhould execute a covenant to indemnify the plaintiff againſt all coſts, damages and expences, which ſhould happen by means of any further proceedings in an action begun at the inſtance of the defendant, and at iſſue in *C. B.* wherein *Marſhall qui tam* is plaintiff, and the now plaintiff defendant; at the bottom of which covenant the arbitrators had ſigned their names.

Page Juſtice thought this a bad award, as not putting a final end to the ſuit, but only giving the plaintiff a new action of covenant: beſides, it was not reducing things to any certainty. And *Mich.* 9 *W.* 3. *B. R. Selby* v. *Ruſſel*, there was an award, that if no further demand was made out in ten days, releaſes ſhould be given; which was held ill; and *Holt* Chief Juſtice ſaid, they could not delegate their authority in any other inſtance, but that of ordering coſts to be taxed by a maſter. 2 *Saund.* 192. *Salk.* 75. 2 *Keb.* 351. 1 *Sid.* 358. He ſaid he ſhould think it well enough, if a bond had been awarded, becauſe there the penalty made all certain.

But the other Judges were of opinion, that the award was good, and that it did not lie in the mouth of the defendant to make this objection. And they ſaid, there was no difference between a bond and a covenant, for the remedy is by action in both caſes. And this being a *qui tam*, in which the poor had an equal intereſt with *Marſhal*, it was not in the power of the arbitrators to order it to ceaſe. They cited *Cro. Jac.* 400. and gave judgment for the plaintiff.

Between the Pariſhes of Curenden *and* Laland in Lancaſhire.

Where the duty on apprentices is not paid the apprentice gains no ſettlement. Fitzg. 167. pl. 679. S. C.

UPON a ſpecial order of ſettlement, it was ſtated, that a poor boy was bound out apprentice by indenture, and the maſter had 20*s.* paid him: that he ſerved three years; but that the

2 Seſſ. Ca. p. 167. No. 134. 1 Barn. B. R. 379. 400. 466. 1 Bott by Conſt 483.

the master never paid the duty of 6*d.* in the pound according to 8 *Ann. c.* 8. § 39. which says, that if the duty be not paid, the indenture shall be void to all intents and purposes whatsoever.

The case was referred to *Fortescue* Justice, who went the circuit. And he held it a settlement, because master had six months to pay the duty in, so that during those six months a settlement was gained: and it should not be in the power of the [904] master to defeat it by matter *ex post facto*. And pursuant to this opinion the sessions held it a settlement.

But upon debate in *B. R.* the order was quashed (1); for they said it was making the indenture good to one purpose, when the act of Parliament had made it void to all intents and purposes whatsoever. And though it was a hard case, they could not break through the positive words of the act. So the order was quashed (2).

(1) In *Rex* v. *Inhabitants of Natland*, where a case had been by consent, referred to the Judge of assize for his opinion, *B. R.* held that it ought to be consider-ed as final, and refused to enter into a discussion of the question, and discharged the rule for quashing the order of sessions. *Burr. S. C.* 796.

(2) *Vide Rex* v. *Holbech, Burr. S. C.* 198. *Rex* v. *Llanvair Duffryn Clwyd, ib.* 236. S. P. But where the consideration money is under 20*s.* the indenture is not void for want of this stamp. *Baxter* v. *Faulam*, 1 *Wils.* 129. *Rex* v. *Yarmouth, Burr. S. C.* 379.

Dominux Rex *vers.* Dominam Lawley.

SHE moved in arrest of judgment after conviction on an information for attempting to persuade a witness not to appear and give evidence against *Japhet Crooke* for forgery. And the exception taken was, that it was not positively averred, that *Crooke* was indicted; it was only laid, that she, *sciens* that *Crooke* had been indicted, and was to be tried, did so and so: whereas in all criminal cases the fact must be positively alleged, and not by inference. 5 *Co.* 120. 6 *Mod.* 30. 4 *Co.* 44. *b.* 2 *Cro.* 19. 4 *Co.* 18. *Hardr.* 2. 2 *Bulst.* 292. 1 *Roll. Rep.* 70.

Sciens in an indictment is a good averment. Fitzg. 122. 263. 1 Barn. B. R. 263. 274. 287. 293. 459. S. C.

But the court upon consideration held it was well enough; and that there is no real difference between indictments and actions, where the *gist* of the action must be positively averred. *Dans plagam mortalem*; *warrantizando vendidit*; receiving stolen goods

goods knowing them to be stolen; are all as loose. So is the case of keeping a dog knowing him to be accustomed to bite sheep. And there is no inconvenience; because if there was no such indictment proved at the trial, the defendant must have been acquitted. *Vide* 1 *Sid.* 183. 337. 2 *Sid.* 127. *Salk.* 686. 2 *Lev.* 208. 5 *Co.* 120. 2 *Roll. Abr.* 82. *pl.* 4. 9. 12. *Dy.* 69. *a.* *Appendix* at the end of the *State Trials* 60. where it is laid that the defendant *satis sciens* Sir *Thomas Armstrong* to have conspired the death of the King, and to have fled for the same, the defendant nevertheless traiterously remitted money to him for his support (1). *Judicium pro Rege*, and the defendant was fined three hundred marks, and to suffer one month's imprisonment.

(1) *Vide Rex* v. *Loggen*, *ante* 75. 2 *Hawk. P. C. ch.* 25. *sect.* 67. 327.

[905]

Man *vers.* Man, coram Magistro Rotulor'.

Bequests to wife for her life, if she should continue a widow, and after her death to A. B. C. and D. share and share alike, and the wife is made executrix. C. and D. die in testator's life-time. Their legacies lapse, and shall go to the executrix, and not according to the statute of Distributions. (1)
2 Kely. 11. S. C. (2)
(a) i. e. the wife.

SAMPSON *Man* made his will, and gave the use of his personal estate to the defendant his wife for her life, if she so long continue his widow, and after her death to *A. B. C.* and *D.* his brothers and sisters, share and share alike. *C.* and *D.* died in the life-time of the testator, and he died some short time after, not having revoked his will. *A.* and *B.* the two surviving legatees bring a bill against the executrix, suggesting a waste made by her of the estate, *&c.* and pray she may exhibit an inventory, and the estate may be secured, *&c.* The defendant set out

(1) That legacies thus lapsed are to be considered as so much of the testator's estate undisposed of by will. *Vide Bagwell* v. *Dry*, 1 *P. Wms.* 700. *Bindon* v. *Earl of Suffolk*, *ib.* 96. The widow being executrix has been held a trustee for the next of kin of an undisposed surplus in *Randal* v. *Bookey*, 2 *Vern.* 485. *Ward* v. *Lant*, *Preced. in Chanc.* 184. *Gobsall* v. *Sounden*, 2 *Eq. Ab.* 444. In *Lady Granville* v. *Dutchess of Beaufort*, 1 *P. Wms.* 115. In *Farrington* v. *Knightley*, *ib.* 551. *Martin* v. *Rebow*, 1 *Bro. Chan. Ca.* 154. But where the thing devised to the wife is an exception out of another devise to some other person, it shall not bar her from her right to the surplus as executrix. *Dutchess of Beaufort's* case, 1 *Bro. Par. Ca.* 305. *Griffiths* v *Rogers*, *Prec. in Chanc.* 231. *Hoskins* v. *Hoskins*, *ib.* 263. *Jones* v. *Westcomb*, *ib.* 316. In *Newstead* v. *Johnston*, 2 *Atk.* 45. *Lawson* v. *Lawson*, 7 *Bro. P. C.* 511. *Et vide Ball* v. *Smith*, 2 *Vern.* 675.

(2) Said in *Kelynge* to have been affirmed in *Dom. Proc.* but not reported in *Bro. P. C.*

out an account of the eftate come to her hands, and what debts fhe had paid; but infifted that the fhares of *C.* and *D.* the deceafed legatees, did belong to her as lapfed legacies; and

Mr. Solicitor General infifted much, that the two fhares did belong to the plaintiffs, the furviving legatees, and that by force of the ftatute of Diftributions they as next of kin ought to have the fhares. But Mr. *Mead* for the defendant argued, that it was the intention of the teftator, his executrix fhould have them: for by the will the legatees are tenants in common, and fhall not take the fhares as furvivors.

Sir *Jofeph Jekyll*, The ftatute of Diftributions only takes effect when the teftator omits to make a difpofition of an intereft vefted in him (3); as if he devifes part of his eftate, and takes no

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(3) The diftinction taken here that the executor is to be confidered as truftee of the furplus for the next of kin only, where the teftator has omitted to difpofe of it *at the time of making his will*, feems fhaken by *Nichols* v. *Crifp*, *Amb.* 769. *Bennet* v. *Batchelor*, 3 *Bro. Chan. Ca.* 28. Where the refiduary legatee dying in the life-time of the teftator, the refidue was decreed to be diftributed. The reafon alfo upon which it has been held that fuch refidue fhall be diftributed inftead of going to the executor, where there is a refiduary claufe, but the name of the refiduary legatee is omitted, feems to militate *equally* againft this pofition. Which is, becaufe it fhews that the teftator, at the time of making his will, intended that the executor fhould not have the refidue, by reafon of his appointment, but that he meant to difpofe of it in fome other manner, although he forgot to fpecify how. *Vide Wheeler* v. *Sheers*, *Mosf.* 288. *Lord North* v. *Purdon*, 2 *Vez.* 495. *Bifhop of Cloyne* v. *Young*, 2 *Vez.* 91. In this laft cafe Lord *Hardwicke* lays it down, "That as an executor muft take by the will, if at the time of making it the intent appears that the executor fhould not take the beneficial intereft in the furplus, no accident afterwards can give it him." So alfo in *Page* v. *Page*, *ante* 820. and in *Painter* v. *Salifbury*, before Sir *Jofeph Jekyll*, cited 2 *Vez.* 93. 99. it was held that part of a refidue becoming undifpofed of by reafon of the death of the legatees in the teftator's life-time, it fhould be diftributed, and not go to the executors. But there are thefe differences between the two laft cafes and the prefent; that in *Page* v. *Page*, *the executors* were themfelves the legatees of the remaining fpecified fhares of the refidue; and both there and in *Painter* v. *Salifbury* the devife to the executors was abfolute, and not of a particular intereft as it is here. (*Vide Dutchefs of Beaufort's* cafe *ut fupra*,) and the *next of kin* were not the legatees of the other fpecified fhares of the refidue, In

no notice of the other part in his will; he dies intestate *quoad* that part not devised, and then the next of kin claim under the statute, and they shall have it: but when an interest has been once disposed of, and the party who would have taken it, had he survived the testator, dying in his life-time, and the testator not making any other disposition of the share he would have had, in case he had survived the testator, nor any declaration shewing a design of altering his will; it is plain the testator, as he knew of the death of the legatees, did design (if he knew any thing of the law) that the executrix his widow should have the shares of the deceased legatees. And the survivors could not well take the shares, because the testator had particularly appointed that each of his legatees should have a special share. And he decreed, the wife should have the two shares absolutely to herself, and the use and interest of the other half for her life, and an account of the testator's estate to be taken. *Ante* 820. and the cases there cited.

In *Bishop of Cloyne* v. *Young*, 2 *Vez.* 91. however the case of *Page* v. *Page* is represented as being that of a devise of a residue to a wife for life, *she being also appointed executrix*, and after her death, to six equally to be divided. And Lord *Hardwicke* reasons upon the case as if he considered her as being executrix, and acquiesces in the determination, that the sixth part that lapsed should go to the next of kin, *and not to her*, because the testator had declared his intent by his will to make a different disposition of the surplus of his personal estate, and that it should not go to his executrix by virtue of her being so, which opinion seems directly to contradict the present case.

Trinity Term

5 Georgii 2 Regis. In B. R.

Robert *Lord* Raymond, *Lord Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq;*

Sir Philip Yorke, *Knt. Attorney General.*
Charles Talbot, *Esq; Solicitor General.*

Meard *verf.* Philips.

IN debt for the penalty of articles relating to the building of *Putney* bridge. The defendant pleaded *Nil debet.* The plaintiff demurred, and the defendant joined in demurrer. Afterwards he moved, that he might be at liberty to withdraw his plea of *Nil debet,* and plead double, *viz.* that he was not appointed by the commissioners, and that he did not agree with them to build the bridge. And it appearing the plaintiff had not been delayed, the court gave leave accordingly (1).

12 Geo. c. 36. General issue waived and allowed to plead double.

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(1) *Vide Wilkes* v. *Wood,* 2 *Wilf.* 204. S. P. after issue joined, and notice of trial given. *Vide* also *Blackbourne* v. *Mathias, post.* 1267. *Taylor* v. *Joddrell,* 1 *Wilf.* 214. *Sed vide Law* v. *Law, post.* 960.

Squire *verf.* Archer.

Bringing money into court. 2 Barn. B. R. 4. S. C.

IN an action for dilapidations the court refufed to let the defendant bring money into court, and faid it was like trefpafs, where you cannot do it, though you may tender amends (1).

(1) *Vide* 1 *Comp. Pract.* 150. *Imp. Pract. K. B.* 256. 5 *Com. Dig.* (C. 10) 320. for the cafes upon this fubject.

[907]

Wilcocks *verf.* Huggins.

An executrix fues upon a promiffory note to her teftator, and dies before judgment, the fix years from the caufe of action being then expired. Her executor brings a new action within four years after the death of the executrix, and the ftatute of Limitations having been pleaded, judgment was given againft the plaintiff, and held, that he ought to have commenced the action within a year.

S. C. much fuller Fitzg. 170. 289. 1 Barn. B. R. 335. 349. 382. 2 Barn. B. R. 5. 15 Vin. Abr. 103. S. C.

(*a*) According to the other reports a latitat.

Ante 550. 736. Lutw. 261. 1 Ld. Raym. 437. Kinfey and Hayward.

CASE by the executor of the executrix of *George Wilcocks* againft the defendant upon a promiffory note dated 30 *July* 1719. The defendant pleaded, *quod caufa actionis non accrevit infra fex annos:* the plaintiff replies, that the firft executrix, *Trin.* 11 *Geo.* 1. fued out a bill of *Middlefex* (*a*) againft the defendant, returnable *Mich. fequen'*, on which there was a continuance by *non mifit breve*, and an *alias* was taken out returnable in *Hilary* term following, before which the executrix died, and made the plaintiff her executor, who in *Michaelmas* term 3 *Geo.* 2. fued out a *latitat* againft the defendant, with intent to declare againft him as above, which he accordingly did; and concludes with an averment, that the caufe of action accrued within fix years before fuing out the firft bill of *Middlefex.*

To this the defendant demurs: and after feveral arguments, it was held, that the replication was ill, there being four years between the death of the firft executrix and the proceeding by the now plaintiff: that the moft that had ever been allowed was a year, and that within the equity of the provifo in the ftatute, which gives the plaintiff a year to commence a new action, where the judgment is arrefted or reverfed: but they faid they would not go a moment farther, for it would let in all the inconveniences which the ftatute was made to avoid (1). Indeed if the fecond executor had been retarded by fuits about the will or adminiftration, and he had fhewn that in pleading, it would have been otherwife, becaufe then the neglect would have been accounted for. And wherever a fuit is allowed to be continued

(1) *Vide Lethbridge* v. *Chapman*, *Mich.* 3 *Geo.* 2. cited *Fitzg.* 171. 289. Where an adminiftrator brought an action 14 months after the inteftate's death, and held not barred. *Vide* 6 *Com. Dig. Temps*, (G. 17.) 344. 1 *Com. Dig. Action upon the Cafe upon Affumpfit*, (H. 7.) 221.

by *journeys accounts*, it muſt be a recent proſecution. 6 *Co.* *Spencer's* caſe, which this can never be ſaid to be. *Per curiam*, Judgment for the defendant.

Berkley *verſ.* Howard.

ON error of a judgment by default, the plaintiff in error aſſigned the want of an original, and warrants of attorney. And the defendant, without putting him to return *certiorari's*, pleaded *in nullo eſt erratum*. And on argument the plaintiff inſiſted, that it was a confeſſion of the errors; and it was agreed ſo to be. But upon application to the court, and affidavit that there was an original and warrants of attorney, the court awarded two *certiorari's*, it being in order to affirm a judgment (1).

A *certiorari* lies to affirm a judgment, after *in nullo eſt erratum*. 2 Barn. B. R. 5.

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(1) *Meredith* v. *Davies*, *Salk.* 270. *Bellew* v. *Scott*, *ante* 440.

Warren *verſ.* Ivie.

[908]

IT was moved upon the act for amendment of the law, that the defendant might be at liberty to rejoin double; but the court held it extended only to the caſe of pleading at firſt.

Cannot rejoin double. 4 Ann. c. 16.

Fiſher *verſ.* Hughes.

ERROR out of the grand ſeſſions in *Wales* in ejectment, wherein the plaintiff declares, that *Robinſon et ux'* demiſed to him one hundred acres of land, and that afterwards the ſame day *Egerton et ux'* demiſed to him *præmiſſa præd'*. Upon Not guilty pleaded, the jury find for the plaintiff *quoad* the lands demiſed by *Robinſon et ux': et quoad tenementa præd'* which *Egerton et ux'* demiſed, they find for the defendants. And the judgment is entered, that the plaintiff ſhall recover his term in the tenements demiſed by *Robinſon et ux'*; *et quoad cætera præmiſſa ſit in miſericordia pro falſo clamore verſus defendentem pro præd' tenementis*, which *Egerton et ux'* demiſed: *et præd' defendens ſit quietus, et eat inde ſine die, &c.*

How to lay the ſecond demiſe in ejectment. 1 Barn. B. R. 464. 2 Barn. B. R. 10.

Strange pro quer' in errore objected, that for want of purſuing the common form in laying the ſecond demiſe to be *aliorum tenementorum*, the judgments here given are contradictory to each other: the defendant is put without day as to the ſame premiſſes, for which the plaintiff recovers.

Et per curiam, This is certainly far from being a correct entry; but we will not reverse it, if it be possible to support it: we will construe *tenementa præd' quæ Egerton et ux'* demised, to mean the term in the premisses, and then it will be well enough (1). The judgment was affirmed.

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(1) *Vide Worral* v. *Bent*, *ante* 835. *Morris* v. *Barry*, *post.* 1180.

Dunn *verf.* Vacher et ux'.

Pleading double.

DEBT upon a bond entered into by the defendant's wife *dum sola*, conditioned that she should, within ten days after the plaintiff's return from his voyage marry him if requested. And *Strange* moved, and had leave to plead, *non est factum*, and that the plaintiff did never request her (1).

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(1) *Vide note to Baker* v. *Westbrooke*, *post*. 949.

[909]

Willing *verf.* Goad.

Gaoler cannot retake for his fees. 2 Barn. B. R. 20. S. C.

SERJEANT *Birch* moved to discharge the defendant out of the custody of the marshall, the plaintiff in the action having sent an order for his discharge. Upon a rule to shew cause, the marshal insisted, that the defendant had broke the prison, and let out himself and another prisoner, who was in execution for 500 *l.* and that though the plaintiff's discharge came whilst he was out of prison; yet he had since re-taken him for his fees, and had charged him in custody with a declaration for the escape of the other. But there being no case to warrant the gaoler's retaking for fees, and the plaintiff in the action being satisfied; the court held the re-taking to be illegal, and consequently the delivery of the declaration to him was void, and the marshal ought to discharge him.

King *verf.* Morris.

1 Barn. B. R. 20. S. C. Variance in the evidence from the declaration. Fitzg. 198. better reported. 1 Barnard. B. R. 364. 418. S. C.

ACTION against the high-bailiff of *Westminster* for a false return. And the declaration set forth, that the plaintiff recovered a judgment against *Alexander Urqhuart*, on which he sued a *fieri facias*, and a warrant was made to the high-bailiff to levy so much, which the plaintiff recovered against the said *A. U.*

1 Upon

Upon the evidence, the warrant was to levy of the goods and chattels of *A. U.* so much, *quas* the plaintiff *recuperavit versus* - - -, (omitting the name;) and the question reserved on the trial was, whether this was a variance. And the court on debate held it none, the *fieri facias* being right; and they said they would take that and the warrant as the same proceeding (1). So the plaintiff had judgment.

(1) The grounds of the judgment as given more clearly in *Fitzg.* are, "That as the variance did not contradict the record, so neither did it cause a failure in proof, for the obvious construction of the warrant is, that the recovery was had against him whose goods are thereby directed to be taken in execution, and they held that though the case had stood singly upon this point, the evidence maintained the declaration. But Lord *Raymond* observed, that the *fi. fa.* which issued on the judgment against *A. U.* was given in evidence, and then the warrant being laid in the declaration to have issued *super inde* (*viz.* the *fi. fa.*) may be understood to be in pursuance of it. So that by reference to that the name must be supplied.

Dominus Rex *vers.* Hudson.

At Guildhall, coram Raymond *Chief Justice.*

Where the original of a way is accounted for, the prescription is destroyed.

ON an information for stopping up a common foot-way, the prosecutor proved, that it had been a common passage under the defendant's house as far back as any witnesses could remember. But the defendant producing a lease made for fifty-six years of this way, to the intent it might be a passage during the term, and the term expiring in 1728; the Chief Justice held the defendant not guilty: and as to the leaving it open since, he said that would not be long enough to amount to a gift of it to the publick.

Lowfield *vers.* Bancroft & al'. Ibid. [910]

The damages cannot be given separately against several defendants.

IN an action for a malicious prosecution, the jury would have found 800*l.* damages against one defendant, and 100*l.* against each of the others. But the Chief Justice saying it could not be done, the jury gave a general verdict for 1100*l.* (1).

(1) *Vide Lane* v. *Santeloe*, *ante* 79. *contra*.

Hoar *verſ.* Dacoſta. Ibid.

Within what time a goldſmith's note muſt be demanded.

WOODWARD's note was paid to the plaintiff at twelve on the *Friday*, who put it into the bank at one, and the next morning at ten, the runner of the bank carried it to the ſhop with other notes to the value of 2600*l.* and left them (as uſual) to call again for the money; he called at eleven, and they ſaid their ſervant was gone to the bank. He called again at two, and they ſaid, they were going to ſhut up, and refuſed to pay; but paid ſmall notes for two hours, and then ſtopt. And the next morning notice was given to the defendant, who had paid the note to the plaintiff. And now in an action for the money, the queſtion was, whether this was payment to the plaintiff. It was inſiſted for the defendant, that he ſhould not ſuffer by the plaintiff's paying it into the bank, who ſent it with other notes; whereas if the note had been tendred by itſelf, it would have been paid. *E contra* it was inſiſted, that if there had been no demand, there would have been no laches, being within a day after the receipt, that the goldſmith ſtopt payment. The Chief Juſtice ſaid there was no ſtanding rule, but left it to the jury, who found for the plaintiff to the value of the note (1).

(1) *Vide ante* 415, 416. 508. 550. 707. *Poſt.* 1175. 1248.

Harris *verſ.* Benſon. Ibid.

Intereſt, when to be allowed.

IN an action againſt the drawer of an inland bill after an acceptance, the Chief Juſtice ruled, that for want of a proteſt according to 9 & 10 *W.* 3. *c.* 17. the drawer could not be charged with intereſt. Then the plaintiff would have had it as for money lent, and that appeared to be the conſideration of the bill; but the Chief Juſtice ſaid, it had never been allowed barely for money lent, without a note; ſo the plaintiff had no intereſt allowed him. *Strange pro def'.* (1).

(1) *Vide Brough* v. *Perkins*, 2 *L. Raym.* 992. *Salk.* 131. S. C. but the bill muſt be above the value of 20*l.* to make a proteſt neceſſary to recover intereſt and expences. *Vide* 3 & 4 *Ann.* *c.* 9. *ſ.* 5.

Dominus Rex *verf.* Clendon.

AN information was laid for an affault in *Middlefex*, and the court refufed to amend it by laying it in *London*.

Amendment. 2 Barn. B. R. 6. S. C. by which it appears that this motion was made after the record had gone down for trial and had been withdrawn.

Dominus Rex *verf.* Dalton.

One found guilty of manflaughter by coroner's inqueft is bailable. Poft. 1242.

THE defendant had the misfortune to kill his fchoolfellow at *Eton*. And being brought up by *habeas corpus* to the Chief Juftice's houfe; it was returned, that he was committed by the coroner for manflaughter. It was therefore prayed he might be bailed. But the Chief Juftice faid, that was no reafon, for if the depofitions made it murder, he would not bail: *e contra*, if they amounted only to manflaughter, he would bail, though the coroner's inqueft had found it murder (1). And he faid the diftinction was between the coroner's inqueft, where the court can look into the depofitions; and an indictment, where the evidence is fecret. That Lord *Mohun*'s cafe in *Salk.* 104. was in point (though that was at *Holt*'s chamber, and not in court as the book reports it) and that the lords bailed him after an indictment for murder was found. He faid that himfelf refufed to bail Mr. *Clifton*, becaufe he thought the depofitions made it murder, though the inqueft was manflaughter only. Ante 855. 2 H. H. P. C. 125.

The bail were four in 4000 *l.* The Chief Juftice faid, it had been ufual to take them in a fum, or body for body; and that where they are taken *corpus pro corpore*, it was a miftake to imagine the bail were to be hanged if the principal ran away: but that the method is to amerce them. 2 Hawk. P. C. c. 15 f. 83. 177. Cromp. Juft. 157. *a.*

(1) *Rex* v. ——, *Hil.* 12 *Geo.* "3. *B. R. It was held by Lord* "*Mansfield, that the depofitions and* "*not the inquifition were to guide the* "*difcretion of the court.*" *MSS.*

Harrifon *verf.* Weldon.

The fpiritual court may revoke an adminiftration if obtained by furprize (1) Fitzg. 303. S.C. more full.

WAlker Weldon died inteftate, leaving *Anne* his wife and *Amphillis* his fifter: the fifter upon the common oath, that fhe believed he died inteftate without wife or children, obtained adminiftration. And in a fuit to repeal it as obtained by furprize, it appeared to be the courfe of the court, never to grant it to the next of kin, until the wife is cited.

(1) *Vide* 4 *Burn's Eccl. Law* 236. 1 *Com. Dig.* Adminiftrator (B. 8.) 375. 6 *Com. Dig.* Prohibition (G. 18.) 137. 2 *Bac. Abr.* Execution 410.

T. Raym. 93. S. C.

The sister moved for a prohibition, and insisted that the ordinary had executed his authority, and cited 1 *Sid.* 179, 370. 1 *Lev.* 186.

5 Co. 78. b. Salk. 36. 1 Lev. 305. 1 Keb. 123, 131.

But the court held, that the ordinary could not be said to have executed the authority, having never had an opportunity to make the election which the statute 21 *H.* 8. *c.* 5. gives him: that it was incident to every court, to rectify mistakes they were led into by the misrepresentation of the parties that if there was no surprize (of which the court below was judge) there ought to be a prohibition, because then the administration will have been duly and regularly granted: but here was a plain surprize (2) and therefore they denied a prohibition.

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(2) In *Fitz.* it is said that the affidavits stated that the widow was prevented from opposing the administration granted to the sister by fraud.

Bentley *verf.* Episc' Elienf.

Offences against the private statutes of a college are not pardoned by the act of grace. Fitzg. 107, 305. Viner vol. 17. p. 155. c. 13. 1 Barn. B. R. 192, 388, 451. 2 Barn. B. R. 9. S. C. Fort. 298. A copy of the present report. 4 Bro. P. C. with the proceedings before the visitor, the statutes and articles.

IN prohibition the plaintiff declared, that King *Henry* 8, 19 *December*, 13th year of his reign founded *Trinity College* in *Cambridge*, and that his successor Queen *Elizabeth* made a body of statutes, the fortieth whereof is intitled '*De magistri si res exigat amotione*;' and speaking of the bishop of *Ely*, there are the words '*corrigat, puniat, expellat*:' that he was cited to appear before the bishop as special visitor appointed by the said fortieth statute of *Elizabeth*, to answer to sixty-four articles, which are insisted upon as violations of the statutes, some of which are long before the last act of grace, and others of them are for setting the college seal in conjunction with the fellows. The bishop for a consultation sets out a former statute of *Edward* 6. in these words: '*visitator episcopus Eliensis sit*,' and avers that he is a visitor general, and as such has a right to proceed upon the articles. The doctor put in an immaterial replication, to which there was a demurrer. And after several arguments these points were ruled,

First, that though several of the facts charged appear to be before the act of grace; yet they are not pardoned by that statute, but are still inquirable by the visitor. There are two sorts of corporations, first, those that are for publick government, and secondly, those that are for private charities. The first of these are governed by the common law, but the second is the creature of the founder, and governed by his private laws. Not that

that the particular persons are exempted from the common law, but the body in general is: and as these are private laws, they are in the nature of trusts, and the breach of them is no crime cognizable by the common law. The King's power of pardoning arises from his having the executive power in him; and though in this case the King is founder, yet the breach of his private statutes are not crimes against the crown. The crimes pardoned are such as are against the publick laws and statutes of the realm, whereas these are in the nature of domestick rules for the better ordering of a private family. [913]

The visitor may punish one man for an act done by him jointly with others.

Secondly, that though several of the crimes imputed to him for violations of the statutes of the college appear to be done by him in conjunction with others, yet that is no reason to exclude the inquiry of the visitor. Suppose the whole body should join in setting the seal to a deed to encourage a murder, would they not be severally punishable in their natural capacity? if he was not concurring in the act, and it is only as to him a virtual consent as included in the body; that will be proper matter of excuse. If a power is lodged in two or three justices, and they abuse it; are they not severally punishable for it? their being corporate acts therefore is no ground for a prohibition.

The appointment of a bishop without his christian name to be visitor extends to his successors.

Thirdly, that by the statute of *Edward* 6. the bishop of *Ely* and his successors are appointed general visitors, it being *ep'us Eliensis* without any christian name, according to the case 15 *H.* 7. 1. *b.* powers in acts of parliament given to bishops or justices will vest in their successors, without the words *for the time being.*

The visitor in his citation must pursue his authority.

Fourthly, that though the three former determinations are in favour of the suit below, yet the prohibition ought to stand; because the bishop has not cited the doctor upon the foot of his general visitatorial power, but as a special visitor appointed by the fortieth statute of *Elizabeth*, which the court said, he was not. For being before appointed general visitor, there remained no farther power in the crown with regard to enlarging the visitatorial power (1). They said it was a question they would not determine, whether when the crown has given statutes and appointed a visitor, the successor can any way alter or annul the former statutes (2): the practice indeed has been otherwise; but it

(1) In the other reports of this case this reason is omitted, and the reason relied upon is, that the 40th statute of *Elizabeth* neither by the letter or design extended to create him a visitor, but supposed him so already.

(2) This means where there is no reservation of a power to alter or annul. The report in *Fitzgibbon*

it had never been determined to be good. For this last reason they were all of opinion, that the prohibition ought to stand.

N. B. Upon a writ of error in parliament this judgment was reversed, and the lords went into the consideration of the several articles, and as to some granted a prohibition, and as to others a consultation.

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gibbon makes Lord *Raymond* go on to say, " that where there is not a concurrence of all parties new statutes cannot by law bind them (*i. e. University* or other corporations) or repeal the old ones: however, I would not be thought to mean that even that concurrence would make the second good." And in the report of the *Master*, &c. of *St. John's College, Cambridge*, and *Toddington*, *Burn's Eccl. Law*. title *College*, 439. 1 *Black. Rep.* 84. S. C. Lord *Mansfield* declares that the first point of what is said in *Fitzg.* to be Lord *Raymond's* opinion, was so determined in the present case. See also the opinion of Lord *Mansfield*, *Rex* v. *Vice Chancellor*, *&c.* of *Cambridge*, 3 *Burr.* 1656. As to the interference of common law courts where there is a visitor, *vide* the cases cited *Rex* v. *Chancellor*, *&c.* of *Cambridge*, *ante* 564. and the note, to which may added *Rex* v. *Bishop of Ely*, *And.* 176. *Rex* v. *Bishop of Ely*, 1 *Black. Rep.* 52.

Michaelmas Term

5 Georgii 2 Regis. In B. R.

Robert *Lord* Raymond, *Lord Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq;*

Sir Philip Yorke, *Knt.* *Attorney General.*
Charles Talbot, *Esq;* *Solicitor General.*

Martin *verf.* Davis.

IN ejectment, the court denied to let the parfon of *Hampftead* chapel defend only for a right to enter and perform divine fervice, notwithftanding the cafe in *Salk.* 256. faying it had been often denied fince.

No rule to defend *quoad* a right to perform divine fervice. 2 Barn. B. R. 27. S. C.

Bullock *verf.* Lincoln.

THE *latitat* was returnable on the *Wednefday*; and upon debate it was held, that the bail bond could not be affigned until after-*Monday*, for the four days are to be one inclufive and the other exclufive; and where the fourth day is *Sunday*, the party has all the next day to put in bail. *Strange pro quer'.*

Practice, on affigning bail bonds. 4 Ann. c. 16. Ante 86, 782.

Dominus Rex *verf.* Heber.

Practice. Barn. B. R. 77, 101. S. C. but not S. P.

THE court would not hear a motion againft a juftice for convicting without fummons, until the conviction was removed before them (1). *Strange pro rege.*

(1) S. P. *Per Afton* J. in *Creepes* v. *Durden*, *Cowp.* 645.

Hoare *verf.* Mingay un', &c.

If an action is commenced againft bail by a wrong procefs, it does not prevent his rendering the principal.

IN *Eafter* term laft the plaintiff brought his action in *C. B.* againft the defendant on a recognizance of bail, but the defendant appearing to be an attorney of *B. R.* the plaintiff was forced to defift: on 20th *October* laft the defendant furrendered the principal; and the firft day of this term a bill was filed. And upon the defendant's motion to ftay the proceedings, as having rendered the principal before action brought; the queftion was, whether the proceedings in *C. B.* were to be regarded; for if they were, the render would be too late. And the court held the render to be good, it being before the return of the procefs in this fuit; and it was the fault of the plaintiff not to begin right at firft. *Strange pro quer'.*

Dominus Rex *verf.* Wright.

Practice on Habeas corpus.

UPON a *habeas corpus* to him, to bring up a perfon under his care for lunacy, he made no return, and *Ketelbey* on an affidavit that the writ was delivered to him, moved for an attachment. The clerks of the crown-office certified, there ought firft to be a rule to return the writ. *Sed per curiam,* In cafes where the liberty of the fubject is concerned, there ought to be no fuch indulgence, but all the expedition poffible; and they granted an attachment *nifi,* &c. (1) whereupon the doctor came in and returned, that before the delivery of the writ he had delivered the woman to her hufband, and that he does not know where fhe is, nor can produce her. And the court held it a fufficient anfwer.

Return to *habeas corpus.* Vide And. 282. 2 Wilf. 154. 40.

(1) *Vide Rex* v. *Earl Ferrers,* 1 *Burr.* 631.

Aſtley *verſ.* Reynolds.

IN an action for money had and received to the plaintiff's uſe, the caſe reſerved for the conſideration of the court was, that above three years ago, the plaintiff pawned plate to the defendant for 20 *l.* and at the three years end came to redeem it, and the defendant inſiſted to have 10 *l.* for the intereſt of it, and the plaintiff tendred him 4 *l.* knowing 4 *l.* to be more than legal intereſt. That the defendant refuſing to take it, they parted; and at ſome months diſtance, the plaintiff came and made a ſecond tender of the 4 *l.* but the defendant ſtill inſiſting upon 10 *l.* the plaintiff paid it and had his goods: and now brings this action for the ſurplus beyond legal intereſt. Where money is extorted by dureſs of goods *aſſumpſit* will lie for it (1). 2 Barn. B. R. 40. [916]

For the plaintiff it was inſiſted by *Reeve*, *Filmer*, and *Draper*, that the action lay, the plaintiff not being *particeps criminis*, and having paid the money, not upon the foot of an uſurious contract, but by compulſion. They agreed the caſe in *Salk.* 22. that if he had been party to the fraud, he could not maintain the action: but here they ſaid the money was extorted; and extorſion and uſury differ in this, that one is given freely, and the other involuntarily, and a man ſhall avoid a deed by dureſs of his goods as well as of his perſon. 1 *Roll. Abr.* 687. And it is obſervable, that all the laws againſt uſury are for the puniſhment of the lender, and not of the borrower; and that it is not pretended that there was any agreement about the intereſt at the time of the loan. And a caſe was cited of *Wilkinſon* v. *Kitchin*, *Trin.* 8 *W.* 3. where money was given to a *Newgate* ſolicitor, to lay out in bribes; and it was held by *Holt* Chief Juſtice, that it might be recovered back from him in an *indebitatus aſſumpſit*, though it appeared he had diſpoſed of it according to his directions. Skinner 412. L. Raym. 89.

E contra, it was argued by *Marſh* and *Fazakerley*, that there was no colour to ſay the plaintiff paid it either by miſtake or force, it being ſtated that he knew the 4 *l.* he tendred was beyond the legal intereſt; and he did it with his eyes open, having another remedy for his goods by trover after tender of the legal intereſt; and it falls within the rule *volenti non fit injuria.*

Et per curiam, The caſes of payments by miſtake or deceit, are not to be diſputed; but this caſe is neither, for the plaintiff Tender of more than legal intereſt is good.

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(1) *Vide Dutch* v. *Warren*, *ante* 406. and the caſes cited in the note.

knew what he did, in that lies the strength of the objection: but we do not think the tender of the 4 *l.* will hurt him, for a man may tender too much, though a tender of too little is bad; and where a man does not know exactly what is due, he must at his peril take care to tender enough. We think also, that this is a payment by compulsion; the plaintiff might have such an immediate want of his goods, that an action of trover would not do his business: where the rule *volenti non fit injuria* is applied, it must be where the party had his freedom of exercising his will, which this man had not: we must take it he paid the money relying on his legal remedy to get it back again.

Where defendant dies pending time of argument or consideration of the court, judgment entered *nunc pro tunc.*

*The plaintiff had judgment; and the defendant dying pending the argument, judgment was ordered to be entered *nunc pro tunc* (2).

(*a*) 11 Mod. 201.

[*91]

In this case was cited *Sumner* v. *Ferryman* (*a*). *Hil.* 1708. wherein it was said to be held, that a bond could not be avoided by duress of goods, contrary to the case cited out of *Roll. Abr.*

(2) *Vide Ifley*'s case 1 *Leon.* 187. *Latch* 87. *Crispe* and *Jackson* v. *Mayor of Berwick*, 1 *Sid.* 462. 1 *Vent.* 58, 190. *Cumber* v. *Waine*, *ante* 427. *Taylor* v. *Matthews*, 10 *Mod.* 325. and *Baller* v. *Delander*, cited *ib.* *Tooker* v. *Duke of Beaufort*, 1 *Burr.* 146. Sir *John Trelawney* v. *Bishop of Winchester*, *ib.* 226. in *B. R.* and *Craven* v. *Hanley*, *Barnes* 255. S. P. in *C. B.*

Dominus Rex *versus* Barnes.

Commitment till he gives security to observe university statutes for life ill. 2 Hawk. P. C. c. 16 s. 18, 186. 4 Com. Dig. Imprisonment. (H. 7.) 373.

THE defendant being brought up on a *habeas corpus*, appeared to be committed by the vice-chancellor of *Oxford*, for carrying goods between *Oxford* and *London* without a university licence, there to remain until he gives security to carry no more, and to observe the statutes of the university for life. *Et per curiam*, It is an illegal commitment, and he must be discharged.

Marshal *versus* Cope.

Practice. 2 Barn. B. R. 58. S. C.

THE rule to assign errors was set aside, because given before any rule on the *scire facias quare executio non* (1).

(1) But they may be served together. *Sambridge* v. *Housley*, 2 *Term Rep.* 17.

Loving *verf.* Avery.

UPON my motion it was held, that there is no certain number of days neceffary to be between the *tefte* and return of a fpecial *latitat*, and that even one day is fufficient, if it can be ferved.

Practice. 2 Barn. B. R. 60. S. C. Tidd's Prac. K. B. 93.

Woollafton *verf.* Walker.

THE declaration ran, *M. Walker attach' fuit ad refpondendum Ifraeli Woollafton adminiftratori bonorum et cattallorum quæ fuerunt Nathanielis Clarke tempore mortis fuæ per Francifcam Clarke nuper executricem teftamenti præd' Nathanielis non adminiftratorum durante quadam lite pendente coram Johanne Bettefworth L. L. D. curiæ prærogativæ Willielmi Archiepifcopi Cantuarienfis commiffario in quodam negotio probationis per teftes teftamenti et ultimæ voluntatis in fcriptis præd' Francifcæ Clarke quod coram præfato J. B. in judicio inter præd' J. W. executorem in eodem teftamento nominatum partem hujufmodi negotium promoventam ex una parte et Margarettam Periam uxorem Edwardi Periam Janem Ramfay et Jemimam Lodington forores naturales et legitimas dictæ Francifcæ et Rogerum Ifraelem et Elizabetham Rant nepotem et neptem ex forore dictæ Francifcæ partes contra quas idem negotium promovetur ex altera parte, de placito tranfgreffionis fuper cafum, &c.* and concludes with an averment, that the fuit is ftill depending.

An adminiftrator pendente lite about a will may bring actions. 2 Will. Rep. 576. Fitzg. 202, 257. 1 Barn. B. R. 423, 467. 2 Barn. B. R. 14, 62. 2 Bac. Abr. 415. S. C.

[918]

After judgment for the plaintiff in *C. B.* it came up by error to *B. R.* and was there argued three times, whether fuch an adminiftration could be granted; and if it could, whether the adminiftrator could maintain an action.

They who argued againft the adminiftration infifted, that it was not warranted by the 31 *Ed.* 3. and that though it had prevailed in the cafe of a conteft for adminiftration, where there is no will; yet in the cafe of a will it had never been allowed; becaufe a will is a total deprivation of their jurifdiction to grant adminiftration. And there are but two ways of dying inteftate; 1. Where no will is made. 2. Where the executors refufe; neither of which appears to be the prefent cafe. And *Carth.* 153. was cited. *Mo.* 636.

E contra, it was argued, that though this is not within the words of 31 *Ed.* 3. yet many adminiftrations are now granted, which

which obtained from neceffity; as in the cafes of minority, or abfence of the executor, in which cafe it is not difputed, but that there is a will, which is doubtful in the prefent cafe. *Ow.* 35. 5 *Co.* 29. *Hob.* 251. 1 *Roll. Abr.* 888. 2 *Brownl.* 83. *Lutw.* 342. 4 *Mod.* 14. *Salk.* 42. *Gibf. Cod.* 574. And as to the cafe in *Carthew*, it was never adjudged.

2 Jon. 134. 2 Show. 69.

Et per curiam, We can fee no difference in the cafes of abfence or minority, but what makes in favour of the prefent adminiftration: it would be very inconvenient if no body could call in the effects, pending the difpute, which often lafts many years. We cannot fay this adminiftration is void, becaufe it is not determined yet, whether there is a will or not (1). The judgment of *C. B.* was affirmed.

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(1) S. P. confidered by Lord *Hardwicke* as fettled by this cafe in *Wills* v. *Rich*, 2 *Atk.* 285. *Knight* v. *Dupleffis*, 1 *Vez.* 325.

Dominus Rex *verf.* Baxter.

Informations are local.

UPON motion for an information the court refufed to grant it, becaufe it appeared that the facts were committed upon the high feas, and an information is local. 3 *Keb.* 603, 799. *Salk.* 174. *Kelyng* 79. *Hil.* 7 *Geo.* 2. *Rex* v. *Hooper*. (*a*) information denied, for a battery in *Newfoundland*.

(*a*) Rep. 1 Seff. Ca. 246. c. 196.

[919]

Skinner *verf.* Rebow.

To a declaration on promife to the affignee, *non affumpfit* to the bankrupt is an ill plea. 2 Barn. B. R. 73. S. C.

IN an action by the plaintiff as affignee of the effects of a bankrupt, he declared that the defendant was indebted to the bankrupt, and being fo indebted promifed the plaintiff to pay. The defendant pleaded that the caufe of action did not accrue to the bankrupt within fix years. And on demurrer it was held ill, becaufe the plea does not anfwer to the promife laid in the declaration, and it precludes the plaintiff from proving any promife to himfelf. 6 *Mod.* 131, 309. *Salk.* 28. *Judicium pro quer'.*

Dominus Rex *verſ.* Theed.

A Conviction on the candle act was quaſhed, becauſe the evidence was not ſet out, it being only alleged that the offence was fully and duly proved (1). *L. Raym.* 1375. *Ante* 608.

In convictions the evidence muſt be ſet out. 1 Seſſ. Ca. p. 417. no. 331. 2 Barn. B. R. 16, 73. And. 84. n. 8 Mod. 329. S. C.

(1) *Rex* v. *Loyd, poſt.* 999. *Rex* v. *Bryan, And.* 81. *Rex* v. *Vipont,* 2 *Burr.* 1163. *Rex* v. *Kilet,* 4 *Burr.* 2063. *Rex* v. *Read, Doug.* 486. *Rex* v. *Thompſon,* 2 *Term Rep.* 18.

The South-ſea Company *verſ.* Duncomb.

UPON a trial at bar in an action for money lent, it appeared that 8000 *l.* was advanced to the defendant by the plaintiffs in the year 1720, upon a pawn of 2000 *l.* ſtock. And the defendant not repaying it, the queſtion to be tried was, whether the plaintiffs could proceed againſt the perſon of the defendant, or muſt ſtand to the remedy againſt the ſtock. And after proof of many particulars, to induce a belief that in theſe loans no regard was had to the perſonal ſecurity; the court left it to the jury upon this point, that where money is generally lent upon a pledge, it will not deprive the lender of his remedy againſt the perſon; and that to diſcharge the perſon of the borrower, there muſt be a ſpecial agreement to ſtand to the pledge only. And the jury found for the defendant. *Strange pro def.*

Where money is lent on a pledge the borrower is liable, without there is an agreement to the contrary. 2 Barn. B. R. 48. S. C. more fully. Cro. Jac. 288. 2 Lev. 116. 2 Keb. 460. Yelv. 179. Salk. 523. 3 Will. Rep. 360. Abr. Ca. Eq. 339.

Benſon *verſ.* Olive.

[920]

In Scaccario, coram Reynolds *C. B.*

UPON trial of an iſſue directed by the court of Exchequer, the depoſition of a witneſs examined in 1672. was offered to be read, without any evidence of his being dead, relying on the preſumption from length of time, which would intitle the reading a deed of that date. The Chief Baron refuſed to let it be read, ſaying a deed had ſome authenticity from the ſolemnity of hand and ſeal: he ſaid if proper ſearches or inquiry

Cannot read depoſition of a witneſs examined fifty years before, without ſome account of his death.

had been made, and no account could be given of him; he would have admitted it at such a distance of time (1).

(1) In a cause with the same name. *Rep.* 1 *Barn.* 348. *Bunb.* 248. this is represented as the case of a deed, but *quære* if S. C.

Dominus Rex *verf.* Lone.

Indictment lies for not taking the office of constable. Fitzg. 192. 1 Sess. Ca. p. 408. no. 326. Cases of Set. and Rem. p. 210. no. 234. 1 Barn. B. R. 413. S. C. Vide 11 Mod. 815. 2 Hawk. P. C. c. 10. f. 46. p. 303. S. P. and Doug. 531. where in a litigated case this exception was not taken.

THE indictment set forth, that at a wardmote held according to the custom of the city of *London* for the ward of *Langborn*, the defendant being an inhabitant and paying scot and lot, was chosen constable, but had refused to execute the office. After verdict *pro rege* it was moved in arrest of judgment, that this was not an offence indictable, but the proper remedy was for the steward to fine him, and *Regina* v. *Dasey*, *Hil.* 10 *Ann.* *Salk.* 175. were cited.

E contra it was insisted, that they might proceed either way. 3 *Keb.* 197, 230. *Cro. Car.* 557. 1 *Sid.* 272. *Cumb.* 416. *Skinner* 669. and *Pas.* 8 *Ann.* *Regina* v. *Jennings*; which was an indictment for not taking the office of high constable. 5 *Mod.* 96. 1 *Vent.* 344. *Trem. Ent.* 221. *Et per curiam*, There is no express determination that it is ill, for *Dasey*'s case had many other faults: this is an office concerning the publick justice; and if the party is absent, he cannot be fined; and it will be inconvenient to stay till the next court for a presentment of his refusal. And *Lee* J. said, he had seen a manuscript report of the case cited from *Salk.* 175. wherein *Holt*, C. J. says, the party may be indicted. *Judicium pro rege.* *Strange pro def*.

[921]

Dominus Rex *verf.* Philips et al'.

Cannot join several in one indictment for perjury (1). 2 Barn. B. R. 80. S. C.

SIX persons were indicted in one indictment for perjury, and four of them pleading were convicted. It was then moved in arrest of judgment, that crimes (especially perjury) were in their nature several, and two cannot be indicted together. And *Palm.* 535. 6 *Mod.* 210. 2 *Roll. Abr.* 81. *pl.* 6, 7. *Salk.* 382. *Pas.* 11 *Geo.* 1. *Rex* v. *Weston et al'*, *ante* 623. *Trin.* 4 *Geo.* 2. *Rex* v. *Clendon*, *ante* 870. 1 *Keb.* 585, 612, 635. were cited.

(1) 2 *Hawk. H. P. C. ch.* 25. *sect.* 89. *p.* 342. *Rex* v. *Benfield and Saunders*, 2 *Burr.* 984.

E contra

E contra were cited *Salk.* 382. in extorsion, *Trin.* 10 *Ann. Regina* v. *Marshall* against two for receiving stolen goods. 1 *Vent.* 302. 3 *Keb.* 700. for maintenance. 2 *Roll. Rep.* 345. *Palm.* 367. *Salk.* 384. against husband and wife for keeping a disorderly house, and *Regina* v. *Dixon et ux'*. *Sti.* 312. *Cro. El.* 230. 3 *Leon.* 230, where this exception was not taken in perjury. *Cro. Car.* 380.

Sed per curiam, There may be great inconveniences if this is allowed: one may be desirous to have a *certiorari*, and the other not; the jury on the trial of all may apply evidence to all, that is but evidence against one. The cases cited are all of that which may be joint, as extorsion, maintenance, *&c.* but perjury is a separate act in each: and *Trin.* 6 *Ann. Regina* v. *Hodson et al'*, two were indicted for being scolds, and compared to barretry, and held not to lie. The judgment was arrested. *Strange pro def'*.

Hilary Term

5 Georgii 2 Regis. In B. R.

Robert *Lord* Raymond, *Lord Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq;*

Sir Philip Yorke, *Knt. Attorney General.*
Charles Talbot, *Esq; Solicitor General.*

Martin *verf.* Moor.

Where the recovery is for more than the debt fworn to, the bail is liable only for that fum and the cofts.
2 Barn. B. R. 44, 89. S. C. Salk. 102. 6 Mod. 90, 267. 3 Keb. 16. 1 Lill. Pract. Reg. 149. 2 Show. 183. 2 Show. 335.

THE *latitat* was with an *acetiam* for 80 *l.* and the declaration was *ad damnum* 150 *l.* and the verdict for 104 *l.* and there being variety of opinions in the books, whether the bail fhould be liable *pro tanto*, or totally difcharged; and the queftion having been many terms depending in this caufe, it came now to be finally fettled. And the authorities contradicting one another, the court took it up on the reafon of the thing; and refolved, that as on the one hand there was no colour to fubject the bail to more than they were bound in, let the plaintiff's demand be ever fo much more; fo on the other hand there was no reafon the plaintiff fhould fuffer by his moderation in taking bail, but the recognizance fhould be confidered as an agreement to pay 80 *l.* or deliver up the defendant. And therefore they made a rule, that the goods of the bail taken in execution fhould be re-delivered, on the bail's paying the 80 *l.* and the cofts

costs (1), or else the goods to be sold and the surplus returned. *Strange pro quer'.*

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(1) *Peterken* v. *Sampson, M.* 25 *Geo.* 3. *Tidd's Prac.* 131. *Doug.* 331. S. C. *Sheddon* v. *Carnes, B. R. E.* 29 *Geo.* 3. *ib. Jackson* v. *Hassel, Doug.* 330. S. P. But bail to the sheriff are liable to the extent of the penalty in the bail bond to satisfy the whole debt and costs, *Mitchell* v. *Gibbons, C. B.* 1 *H. Black.* 76.

Dilley *verſ.* Polhill. [923]

IN debt the plaintiff declared, that 7 *March* 3 *Geo.* 2. the defendant by bond submitted himself to the award of *James Pope*, an arbitrator indifferently named and elected as well on the part of the plaintiff as of the defendant, so as the award be made in writing under hand and seal before 20 *April*. That 18 *April*, *Pope* by writing under hand and seal, reciting that an action had been brought by the plaintiff against the defendant for words, therefore to end the dispute he awarded, that the defendant should on 27th of *April*, between two and five in the afternoon, at the *Cock and Lion* in *Dartford*, pay the plaintiff ten guineas for his damages, and 6 *l.* 19 *s.* for costs; that the plaintiff should pay the defendant 1 *s.* after which both should give mutual releases.

In debt on an award a mutual submission must be shewn. 1 Barn. B. R. 448. 2 Barn. B. R. 42, 55. S. C. Vide 1 Com. Dig. Arbitrament (L 9.) 554.

The defendant demurred, and *Strange pro def'* argued, that the plaintiff had not in his declaration shewn what was necessary to maintain his action, for he has not shewn that there was any submission on his part; and it is contrary, 1. to the nature of an award, and 2. to the precedents.

1. An award is the determination of a third person between two others, who submit to his judgment. These submissions create a mutual obligation upon both, to acquiesce in his decision. It is therefore contrary to the nature of an award, that the arbitrator should determine any thing with regard to one who does not submit to his judgment; and in 1 *Roll. Rep.* 194. it is resolved in *assumpsit*, that mutual promises shall bind, without any other consideration.

1 Saund. 326. Bro. Arbitr. 18.

2. The precedents are all contrary, and a strong evidence what the law is. 2 *Saund.* 61, 127, 337. 1 *Saund.* 32. *Mo.* 359, 642. *Rast.* 153. *b.* *Co. Ent.* 159. *a.* *Old Ent.* 41. *a.* 64. *a.* *Tho. Ent.* 107, 116. *Ashton's Precedents* 188, 200. *Litt. Rep.* 312. 1 *Leon.* 72. 1 *Roll. Rep.* 5. *Brownl.* 181. *Regist.* 111. *a.*

Hawkins

Hawkins Serjeant *contra* agreed, that a mutual submission was necessary to be shewn; but insisted that it is sufficiently averred, it being laid that the arbitrator was elected for both, and that in declarations it is enough for the plaintiff to shew what makes for him, according to 1 *Sid.* 161. *Litt. Rep.* 312.

Strange replied and observed that the averment is not that the arbitrator was nominated *by*, but *on the behalf* of the defendant, which might be done by a friend to whose nomination the de-
[924] fendant might not submit. And as to the case in 1 *Sid.* it is only said by the counsel, and agreed by *Twisden*, that if the plaintiff brings debt for money generally, without shewing *the award* to be of both parts, it is well enough; but not a word said about the submission. And as to *Litt.* 312. that is only that the plaintiff need not set out any more of the award than makes for him; but in that case it is averred, both submitted. And for want of it here it doth not appear that the defendant has any remedy for the 1 *s.* or release awarded to him.

Et per curiam, There is a great deal of difference where the action is brought upon the bond of submission, and where it is upon the award; in the first case, the defendant by craving *oyer* shews that there were mutual submissions, the condition always so reciting it: but in the other case it must be averred, before you can properly introduce your award: *on the behalf*, does not import him to be named *by* the defendant: and in debt on the bond, *nul agard fait* admits a submission: we think therefore, that as a mutual submission is necessary to be shewn, there is nothing tantamount on this declaration. The plaintiff discontinued on payment of costs.

Cortisos *vers.* Munoz.

Addition of "late of *London* merchant" good, though defendant commorant in *Middlesex*. 2 Barn. B R. 95. Vide 1 Com. Dig. Abatement (F. 25.) 45.

THE defendant was sued by a special original with the addition of *nuper de London merchant*: the defendant pleaded, that for four years before he was commorant at *White-chapel* in *Middlesex*, and traversed that at the time of the writ *vel nuper tunc vel unquam postea* he was of *London*; and made affidavit that the contents of his plea were true, and *Theloal*'s *Digest*, *lib.* 6. was cited in maintenance of it.

But upon motion (1) the plea was set aside, for by 1 *Hen.* 5. *c.* 5. the plaintiff has his election to name him of the place he was

(1) *Sed vide Shelly* v. *Wright*, in C. B. *Barnes* 338.

lately

lately commorant in, the words being *de villes et counties ou ils fueront ou sont*; and so is 19 *Hen.* 6. 1. *Bro. Brief* 174. *Strange pro quer'.*

Inter paroch' St. Margaret's Westminster *and* St. Martin's Ludgate.

UPON a special order of sessions it was stated, that a *Fleet* prisoner took a house of 25 *l. per annum* within the rules, and lived in it eight years, and paid all taxes; and it was held he gained a settlement.

Poor. 1 Barn. B. R. 74. 2 Kely. 240. 2 Bot. by Const. 146. pl. 186. S. C.

Pendrell *vers.* Pendrell.

[925]

UPON an issue out of Chancery to try, whether the plaintiff was the heir at law of one *Thomas Pendrell*, it was agreed, that the plaintiff's father and mother were married, and cohabited for some months; that they parted, she staying in *London*, and he going into *Staffordshire*; that at the end of three years the plaintiff was born. And there being some doubt upon the evidence, whether the husband had not been in *London* within the last year, it was sent to be tried. And the plaintiff rested at first upon the presumption of law in favour of legitimacy which was encountered by strong evidence of no access. And it was agreed by court and counsel on the trial at *Guildhall* before Lord Chief Justice *Raymond*, that the old doctrine of being within the four seas was not to take place; but the jury were at liberty to consider of the point of access, which they did, and found against the plaintiff (1).

Though the husband is in *England*, yet if no access can be proved the issue are bastards. Cited 3 Will. Rep. 275. L. N. P. 112, 294.

The Chief Justice allowed the defendant to prove the mother to be a woman of ill fame. *Salk.* 120. *Cro. Jac.* 541. But he would not allow the mother's declarations to be given in evidence, till she had been called, and denied them upon the cross examination (2). *Strange pro quer'.*

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(1) *Rex* v. *Inhabitants of Bedal*, *Tr.* 11 *Geo.* 2. *B. L. P.* 112. *post.* 1076. *Lomax* v. *Holmden* at bar, *post.* 940. *Goodright* v. *Saul*, 4 *Term Rep.* 356. S. P. and that antient authorities are not wanting to justify over-ruling the old doctrine. *Vide Harg. Co. Litt.* 126. *a.*

(2) Because the declarations of the wife without oath *she being alive*, cannot be given in evidence *in chief* even in a question of legitimacy, as they are not the best evidence; but after she had denied them upon cross examination they were admissible to impeach her credit. *Vide Bull. L. N. P.* 134. *ib.*

ib. 294. *Clark* v. *Wright*, cited *Caf. Temp. Hardw.* 80. Upon the queftion of a child's legitimacy the father or mother having no intereft in the caufe may be produced by either fide to prove or difprove *the fact and time of marriage*. *Stapleton* v. *Stapleton*, *Caf. Temp. Hardw.* 277. *Lomax* v. *Lomax*, *Bull. L. N. P.* 287. Lord *Valentia*'s cafe in *Dom. Proc.* 1771. cited *Cowp.* 593. *Sacheverell*'s cafe *Bull. L. N. P.* 241. *May* v. *May*, *ib* 112. *St. Peter's* v. *Old Swinford*, *ib.* 112. *Burr. S. C.* 75. *S. C.* So alfo to prove that the child was born *prior or fubfequent to a marriage had between the parents*, their teftimony, or after their death, evidence of their declarations is admiffible. *Goodright ex dem. Stevens* v. *Mofs*, *Cowp.* 591. But where the child *is born in wedlock*, the evidence or declarations of the parents feem inadmiffible *to baftardize* fuch iffue. Said by Lord *Mansfield* to have been folemnly determined by the delegates, *Cowp.* 594. *ib.* 592. *Rex* v. *Reading*, *Caf. Temp. Hardw.* 79. *Rex* v. *Rooke*, 1 *Wilf.* 340. But in thefe laft cafes the evidence of the wife went to exonerate the hufband from the maintenance of the baftard, and fome ftrefs is laid upon her being the fole witnefs. This rule however where the child appears *to be born in wedlock* has this exception, that the wife may be admitted to prove the fact of adultery from the neceffity of the thing. *Rex* v. *Reading*, *Rex* v. *Rooke*, *ut fupra*. It is faid in *Bull. L. N. P.* 287. that in an ejectment *Wright* J. admitted the father to prove the daughter legitimate. But as it is not ftated whether the fact he was to prove was the time of marriage, &c. that cafe does not feem a direct authority that a parent may be admitted where it may be neceffary to fupport the prefumption of legitimacy arifing from a child's being born in wedlock, although they cannot give evidence to baftardize it.

The Bifhop of London *verf.* The Mercers Company

Of the effect of the union of parifhes after the fire of *London*. (1). Fitzg. 169, 147. 1 Barn. B. R. 389, 439. 2 Barn. B. R. 64, 108, 145, 157, 170. 2 Kely. 215. S. C.

ERROR of a judgment in *C. B.* in a *quare impedit* brought by the mercers company and *Edmund Lewen*, clerk, for the prefentation to the parifh church of *Saint Mildred Poultry* and *Saint Mary Colechurch* in the city of *London*.

The declaration fet forth, that both churches were burnt down by the fire of *London*, and by the act for rebuilding the city it is provided, that the two parifhes fhould be united, and the patrons to prefent by turns, and that which had the greateft endowment to prefent firft; that *Saint Mildred Poultry* had the greateft; that the plaintiffs had the advowfon of the rectory impropriate of *Saint Mary Colechurch*, and the crown the other, whofe church was full of *Richard Perinchief*, clerk. That after

(1) *Vide Warden and Commonalty of Grocers* v. *Archbifhop of Canterbury*, 3 *Wilf.* 214. 2 *Black.* 770. S. C.

the

the union King *Charles* the Second presented *Richard Perinchief*, Dr. in divinity, who died, and the King presented *John Williams*, who was instituted and inducted, and afterwards promoted to the see of *Chichester*, whereby it belonged to the King to present by his prerogative; and the crown thereupon presented *George Martin*, who was instituted and inducted, and died incumbent, and King *George the* First presented *Robert Breton*, who [926] was instituted and inducted, and the church became void by his resignation; *unde* it belongs to the company to present, but the bishop and *Lewen* hinder them.

The bishop pleads that he claims nothing but as ordinary.

The incumbent pleads, that before the plaintiffs had any thing to do with the advowson, and before the act for rebuilding the city, the master and brothers of the hospital of *Saint Thomas of Acon* were seised in fee in right of their house of the rectory and church of *Saint Mary Colechurch*, which were annexed to the hospital, and were held by them as parsons, without any presentation or admission. That upon the dissolution of the house it came to King *Henry* the Eighth in the same condition, who became seised thereof in right of his crown, and 21 *April* 33d of his reign, by letters patent under the great seal granted the said rectory to the mercers company, to hold *in capite* by the twentieth part of a knight's fee, and a stipend for a chaplain, and that they should hold in as ample a manner as the hospital did. That King *Charles* the Second was seised in right of his crown of the advowson of *Saint Mildred Poultry*, and presented *Richard Perinchief*, who was instituted and inducted, and that the mercers company enjoyed *Saint Mary Colechurch* to their own use, without any presentation. That after the union *Perinchief* resigned, and was thereupon presented to both by the crown, and was instituted and inducted, and died incumbent, whereupon *Williams* was presented, instituted, inducted, and promoted to the see of *Chichester*, and the crown presented *Martin*, who was instituted and inducted, and died incumbent, and then *Breton* was presented by the crown, and instituted and inducted, and resigned, on which he says it belonged to the crown to present, who before the writ presented him; and traverses that at the time of the act for rebuilding, the mercers company were patrons of the rectory of *Saint Mary Colechurch*.

The plaintiffs take judgment on the bishop's plea, with a *cesset executio quousque, &c.* And as the incumbent's plea, they join issue upon the traverse; which is found for the plaintiffs, who have thereupon judgment to recover their presentation. And then goes out the writ to enquire of the value, plenarty,

narty, &c. And the inquisition finds, 1. The church to be vacant, 2. *Quod tempus semestre transivit*: and, 3. That the yearly value is 140 *l.* *ultra reprisas*: and there is judgment for 70 *l.* for a moiety of the annual value, and for a writ to the bishop. Whereupon a writ of error was brought, and the general errors assigned.

[927] *Reeve pro quer' in errore* argued, that there appeared no title for the company to recover this presentation. This depends in a great measure on the act for rebuilding the city, which is 22 *Car.* 2. *c.* 11. § 48. and provides, "That these two churches "shall be united, and that the several and respective patrons of "the churches so united shall and may present by turns to "that church only which by the act is appointed to be rebuilt, "the first presentment to be made by the patron of such of the "said churches, the endowments whereof are of the greatest "yearly value." In order therefore for the plaintiffs to intitle themselves to present, it is necessary for them to shew themselves to have been patrons of one of the united churches at the time of the union, which they have not done: on the contrary it appears, that this was an appropriate church, in which there was a perpetual incumbency; and the act only intending to preserve the former rights of patronage, cannot be set up as creating a new one; in short that this (though it may be hard) is a case not provided for by the act.

By a grant of the advowson of the rectory, the right of the impropriator would not pass. *Hob.* 304. 1 *Roll. Abr.* 45. What words therefore are there in the act, which give the company a right of advowson they could never pretend to before?

If it is said that the verdict by finding them patrons has put this matter out of doubt, I answer that the verdict is of no use, being inconsistent with the case made upon record; and wherever the verdict is upon a point not material, the court is not bound to give judgment upon it. 2 *Roll. Abr.* 99. *Carth.* 370. *Ante* 873.

But supposing they had a right to present as patrons, yet their judgment is ill. 1. Because they have not alleged any presentation in their count, which they ought to in *quare impedit*, which is a possessory action; and the precedents always are, that the plaintiffs, or those under whom they derive, have presented. 3 *Lev.* 435. *Lev. Ent.* 141. 2. It appears upon the declaration, that this is not the turn of the company. Before the union the church was full of *Richard Perinchief*, clerk; and it not being

ing shewn that the church was became vacant when the crown presented *Richard Perinchief*, doctor in divinity, or that the doctor so presented was instituted and inducted, it will not go for the turn of the crown; and it is admitted the crown was to have the first turn.

The first turn then which the crown had was upon the presentation of *Williams*, after *Perinchief* died; and he being promoted to a bishoprick, the next turn was not an alternate one, but in right of the prerogative, and the company had no turn till after the death of *Martin*. The crown then usurped, [928] and presented *Breton*, and now on his resignation it is the turn of the crown; and the company should either have brought their writ on the presentation of *Breton*, or have staid till there is a vacancy of the present incumbency.

I expect it will be said, that by the plea it appears, *Perinchief*, who was presented after the union, was instituted and inducted; and that though the variation in the addition between clerk and doctor in divinity excludes a presumption they were the same person, yet the last was a full turn.

In answer to this I observe, that the allegation referred to is only in the inducement to the traverse, which whether it be true or false is not material; and wherever matter of substance is omitted, it will not be made good by the plea. 7 *Co*. 24. 8 *Co*. 120, 133.

Strange contra argued, that upon the whole record the plaintiffs appear to have a right to present to this church; that the verdict was upon a material point, and is not inconsistent with the declaration: and that whether the plaintiffs are to be considered as impropriators, or as patrons of a donative, before the act; yet now upon the foot of the act this church is presentative, and the plaintiffs have a right to present to it.

To intitle themselves under the act, it was necessary to aver, that they were patrons at the time of making the act, which vests the right in the *then* patrons: to overthrow this, it was proper for the defendants to deny, that the plaintiffs were within the description of the act; and accordingly they traverse that part of the declaration, which avers them so to be; the issue is joined on this, and by the verdict of the jury, it is established, that the plaintiffs were the undoubted patrons at the time of the act.

Every impropriator or appropriator is a patron, for he is both patron and parson, and so is 2 *Roll. Abr*. 334. The verdict therefore

therefore cannot be said to be inconsistent with the declaration, wherein the plaintiffs allege themselves to be patrons.

It must be agreed, that before the act the plaintiffs had an interest in this church, and therefore the court will never give into so harsh a construction of the act, as totally to take away their right; it appearing on the contrary to be calculated for preserving the respective rights: it is hard enough to take from them the profits of the rectory, and but a small amends to give them the presentation.

[929] Now if they cannot present, their right is gone, and the patron of the other church will present upon every vacancy, and his presentee will be intitled to the profits of this church, either as curate under the plaintiffs who never appointed him; or as vicar, though no vicarage was ever created.

If this be considered as a donative, it cannot be disputed but that without the act it was in the power of the plaintiffs to make it presentative whenever they pleased. *Co. Litt.* 344. *a. F. N. B.* 35. and when they have once presented, it remains presentative ever after.

On the other hand, if this be considered as a rectory appropriate to a religious house, yet by such appropriation the advowson or right of patronage was not destroyed, but capable of being revived by a presentation to the church, or by the dissolution of the religious house. Here was a dissolution, and the crown in whom it vested granted it out again to the plaintiffs, who were lay persons; whereby I apprehend they were seised in fee of the rectory and church impropriate, and had the right of supplying the cure without institution or induction, which is making it a donative in them, and them the patrons: and as patrons of a donative no body will say they cannot present. The intent of the act was to put both churches on the same foot, and not leave one to be presentative and the other to be filled by donation, which must create confusion.

But whatever the right was before, yet by force of the word *present* in the act, that is now the only way by which this church can be filled; for *presentation*, is a term well known in law, and by force of that word only a donative has been changed into a presentative. *Hill.* 3 *Geo.* 1. *Shirt* v. *Carr*, the church of *St. Michin* was a donative in the dean and chapter of *Dublin*, and by act of parliament was divided into three parishes, and by the same act it was appointed that the right of patronage and presentation to the three churches should be in and belong to the said

2 Bro. Par. Ca. 49.

said dean and chapter, in such manner as the right of nomination or presentation to the old church was before, and no otherwise. The patrons continued to nominate their clerk, and it was held they had no right, for that the ancient method of filling the old church was destroyed, and a new one created by the act, *viz.* a right to present only. This was the opinion of the *King's Bench* in *Ireland*, affirmed here, and in the House of Lords.

But then it is objected, that a *quare impedit* is a possessory action, and the plaintiffs have shewn no presentation in themselves, or those under whom they claim. To this I answer, it appears [930] impossible they should do so in this particular case, because the right of presentation commences but with the act, and it appears this is their first turn. In the *quare impedit* brought against Dr. *Birch* for the church of *St. James's*, the crown made title under the act which made that a new parish, and no presentation was alleged before; and if the bishop of *London*, or Lord *Jermyn*, had after the death of *Tenison* been put to bring their *quare impedit*: it would have been impossible for them to have alleged any presentation, it being the first turn after the act. Besides, this objection holds against ever making a donative presentative, for there must be a time when it shall begin to be so; and it is putting it in the election of the ordinary, whether the founder of the donative, or the person claiming under him, shall be allowed to make it presentative, which was never questioned.

And as to the objection that this is not the turn of the company, I agree that if it is to stand upon the declaration only, it is so; but as the court is to judge upon the whole record, and it appears *Perinchief*'s presentation, as stated in the plea, will make a turn of the crown; we are intitled to pray in aid of it. As also of 7 *Ann. c.* 18. which provides 'that no usurpation shall 'displace the estate of a patron, or turn it to a right; but that 'notwithstanding he may maintain a *quare impedit* upon the next 'avoidance.' Here the crown usurped the last turn, and therefore we have a right to a *quare impedit* in this. Why is not this to be considered as a new created church; and if it is, it is not exactly the case of *St. James's* before cited? where the bishop of *London* and Lord *Jermyn* had alternate rights by act of parliament. And yet it was held to partake of all the nature of an old church, and that the King's prerogative should take place upon it, contrary to the strict letter of the act.

This does not so much depend upon the nature of the interest which the company had under the grant of *Henry* 3. before the fire, as on the act for uniting the two churches. If they had it

as a donative before, they might present when they pleased, and maintain a *quare impedit* on the ordinary's refusal to admit. If they were impropriators by virtue of that grant, they were still patrons, and as such have their rights preserved, though new moulded, by the act for rebuilding the city, which has directed that for the future they shall exercise their right by presentation, and no otherwise.

The court made little difficulty of the case upon the merits, saying that an appropriation might create a right of patronage; and they could not take it to be contrary to the verdict, or put so hard a construction on the act as to take away the company's right, it being agreed on all hands that they could not use it as they did before: but as to the objection to its not being the company's turn, they thought it so considerable, as to appoint another argument on that only. And now this term the Chief Justice delivered the resolution of the court. That though it did not appear on the declaration to be the company's turn, for want of shewing that *Perinchief*, who was in before the fire, died or resigned, or that the other presented was the same person; yet upon the pleading over it was helped, for there are no negative words in the declaration, and since the statutes of jeofails, there have been cases that have gone as far as this. *Cro. Car.* 288. Sir *W. Jones* 307. In words, the defendant justified, and shewed the oath which the declaration did not, only generally that he was forsworn, which then was held not actionable, and judgment was affirmed, which could not be without praying in aid of the plea. 1 *Sid.* 184. It was not said to be the plaintiff's hoop; but there being a justication, it was held to be cured in so substantial a fault: and to the same purpose is *Lutw.* 1492. The judgment therefore was affirmed. And afterwards the company moved for damages to be assessed *occasione dilationis executionis*, on 3 *H.* 7. *c.* 10. and that the computation might be at the rate set on the inquiry for the value of the church, during the time they were kept out by the writ of error, and cited *Cro. Car.* 145, 173. *Dyer* 77. *Sed per curiam*, Though they are intitled to damages, yet they are not to compute them in that manner. For if the writ of error had not been brought, they would not have been intitled to the profits, but their presentee, and all the real damage they sustain is the being kept out of the 70 *l.* Let the master therefore compute legal interest for that, and add it to the costs: they said the cases in *Croke* were unreasonable, and had never been considered (1).

[931]

Want of an averment in a declaration helped by pleading over.

(1) *Vide Bedily* v. *Bellamy*, 2 *Burr.* 1097. *Wilford* v. *Davidson*, 4 *Burr.* 2128. *Zinck* v. *Langton*, *Doug.* 750. 3*d. ed. n.* [3] and see the distinctions taken and cases cited *ib.* [*n.* (*a*) 742.] and *Shepherd* v. *Macbeth* in *Cam. Scac.* 2 *H. Black.* 284.

Easter Term

5 Georgii 2. Regis. In B. R.

Robert *Lord* Raymond, *Lord Chief Justice.*
Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq;*
Sir Philip Yorke, *Knt. Attorney General.*
Charles Talbot, *Esq; Solicitor General.*

Dominus Rex *vers.* Inhab. de Uttoxeter* in Com' Stafford.

UPON great debate, and search of precedents, it was held, that a *certiorari* would not lie to remove the poor's rate itself, the remedy being to appeal, or by action when a dis- The poor's rate is not to be removed. 1 Bott b Const. 351. *pl.* 247.

Cunn. 28. 1 Sess. Ca. p. 150. no. 143. 1 Barn. B. R. 443. 2 Kely. 117. S. C.

* In the very short note of the case of the *King* v. *Inhabitants of Uttoxeter*, in 2 *Stra.* 932 the determination that in the allowance of rates the justices act only *ministerially* is not mentioned; it is well known that in Mr. *Ford's* MSS. in which the above determination is mentioned, a great many of the cases in *Strange* are reported at much greater length, and more completely than by that author. Mr. *Douglas* had an opportunity of perusing *Ford's* account of this case and several others; but although those who have the pleasure of knowing his son, know how ready he is to permit his friends to consult his father's valuable MSS. it is much to be wished that he may some time or other make it publick for the general benefit of the profession. See *Doug. Hist. Controv. Elect* 142. note. *Note to the second edition.*

tress is taken, which will answer all the ends of justice in coming at an unequal rate; whereas if the rate itself should be required to be sent up, great inconveniences and delays would follow, and a case was cited *Mich.* 10 *Ann. Regina* v. *Inhab. de St. Mary the Virgin* in *Marlborough*, where it was so resolved (1).

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(1) *Rex* v. *Justices of Shrewsbury, post.* 975. *Rex* v. *King*, 2 *Term Rep.* 235.

Throgmorton ex dimiss' Miller *vers.* Smith & al.'

Where lessor is an infant security must be given for costs. 2 Barn. B. R. 140. 2 Kely. 65. S C. (a) And the note.

THE lessor of the plaintiff being an infant, I moved that he might be obliged to name a good plaintiff, who might be answerable for costs, and cited *Noke* v. *Windham, ante* 694 (*a*). And upon searching for that rule, it appeared that the father of the infant entred into a rule to pay costs; accordingly in this case there was a rule to stay proceedings, until security given, and the last day of the term the infant's mother entred into the rule.

[*933]

Hayes *vers.* Warren.

Assumpsit will not lie to a past consideration unless it was at the request of the party (1). 2 Barn. B. R. 55. 71 140. 2 Kely. 117. S. C.

ERROR of a judgment in *C. B.* in an action upon the case upon several promises, and after judgment by default, and intire damages, it was objected, that the fourth count was for work and labour done by the plaintiff for the defendant, in consideration whereof he promised to pay. And it was objected, that this was a past consideration; and not being laid to be done at the request of the defendant, it could be no consideration to raise an *assumpsit*, and 1 *Roll. Abr.* 11. *pl.* 1. *Cro. El.* 442. 741. 3 *Leon.* 91. *Dyer* 272. were cited by *Hussey*.

Strange contra, cited 2 *Leon.* 111. 225. *Raym.* 260. *Hutt.* 84. where *assumpsits* have been maintained on a past consideration: and though formerly courts were strict, yet now they draw nearer to common sense. There was a time when *assumpsit pro bonis et mercimoniis* generally, would have been wondred at, and *Holt* used to say, he was a bold man that first ventured on them; but now they are every day's experience: and why should not gratitude be a good consideration? he further insisted, that this is not to be taken as a past consideration; because the work and

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(1) *Vide Pillans & al'* v. *Van Mierop*, where the present case is denied to be law by *Wilmot* J. 3 *Burr.* 1671.

promise

promise are both laid on the same day, and the law makes no fractions of a day, and cited *Latch.* 150. in point. He further insisted, that upon the whole it appeared to be at the request of the defendant, it being laid to be done *for* him, and that the plaintiff *proinde* deserved *from the defendant* so much, which he has not paid, *ad damnum* of the plaintiff, and cited *Latch.* 112. 274.

Sed per curiam, It does not appear that this work was for the benefit of the defendant, and we must take it to be a past consideration, being laid that *postea* he promised to pay: if this was after a verdict, we should think the inferences from the words *pro quantum meruit de def'* would be material; but the statutes of jeofails do not protect judgments by default against objections that are cured by a verdict at common law, but such as are remedied after a verdict by the statutes. The judgment of *C. B.* was reversed.

The effect of the statutes of jeofails as to judgments by default.

Lowfield *vers.* Bancroft & al'. Ante 910.

AFTER verdict for the plaintiff in an action for a libel, the judgment was arrested, because it was not laid that the libel was of or concerning the plaintiff, and *Cro. Jac.* 126. was cited. *Strange pro quer'.*

Judgment arrested, because libel not laid to be *de et concernens* the plaintiff.

Lampen *vers.* Hatch.

IN an action for words, the jury on the writ of inquiry gave 10*s.* damages, and the costs were taxed at 13*l.* and a judgment to recover them. Upon error it was objected, that by 21 *Jac.* 1. *c.* 16. § 6. if the jury that inquire of the damages find under 40*s.* there shall be no more costs: and it was therefore prayed to be reversed as to the costs.

Upon writ of inquiry in an action for words, verdict for judgment for 10s. and judgment for it, and 13l. cost, it must be reversed *in toto.* 2 Kely. 61. S. C.

Strange for the plaintiff in the action insisted on account of the smallness of the damages, that the judgment should be reversed *in toto*, it being a joint judgment, and not like the cases where no costs can be given, and there is a distinct judgment. And the court without any difficulty reversed the judgment *in toto* (1). *Ante* 188. 808.

(1) *Vide Rous* v. *Etherington*, 2 *Ld. Raym.* 870.

Dominus Rex *verf.* Smith.

The commitment muft fpecify what gaol the party is fent to.
2 Barn. R. R. 133.
2 Hawk. P. C. laft ed. ch. 16. f. 13. 236.

HE came up from *Oxford* gaol on a *habeas corpus*, and appeared to be committed for want of fureties in an action in the vice-chancellor's court of injury and damage to the value of 1000 *l.* and by warrant the beadles of the univerfity were required to carry him to prifon. And now on my motion he was difcharged. Firft, becaufe the warrant was not directed to any gaoler, but was only generally to carry him to prifon; and fecondly, becaufe it did not appear the plaintiff had made any affidavit of a debt, without which the court below could not hold to bail.

Goodtitle *verf.* Petto.

On covenant to ftand feifed for love and affection, one named in the deed may aver himfelf a relation.
A covenant in confideration of love and affection to B. his wife to ftand feifed to the ufe of fuch perfons as *B.* fhall think fit to difpofe to; *B.* difpofes to one who is a ftranger to the confideration, no ufe arifes.
Fitzg. 299 is a report of the firft argument only.
2 Barn. B. R. 10. 90. 142. S C.
3 Com. Dig. Covenant, (G. 5.) 277.

IN ejectment on the demife of *William Thornton*, a cafe was made for the opinion of the court. That *Angelo Burt* being feifed in fee of the premiffes in queftion, in confideration of the love and affection he bore to *Anne* his wife, and for fome provifion in cafe fhe fhould furvive him, and for fettling the premiffes in the manner after mentioned, 20 *June* 1702, covenanted to ftand feifed to the ufe of him and his wife for their lives and the life of the furvivor, *remainder to the iffue of their two bodies, remainder to the ufe of fuch perfon or perfons as his wife fhall think fit to difpofe to, and for want of fuch difpofition to the ufe of the leffor of the plaintiff. That by indentures of leafe and releafe, 13 & 14 *April* 1724, after the death of the covenantor without iffue, *Anne* the wife conveyed the premiffes to her fifter *Joan Smallpeece* and her heirs, reciting the power and her intention to difpofe. That *Joan* by her will gave the premiffes to the defendant. That the leffor of the plaintiff was the nephew of the covenantor. And whether he or the defendant had the right was the queftion.

And two points were made in the cafe. 1. Whether any ufe can arife to the defendant, who is a ftranger to the confideration: and 2. Whether if the defendant has no title, the leffor can be faid to have any, as within the confideration.

[*935]

As to the firft point the court were all of opinion, that there was no title in the defendant. Had the limitation been to the wife in fee, there would have been no doubt but thofe claiming under her would have enjoyed. But as the exprefs confideration is only for the fupport of the wife, and the appointment is not to

to be for her benefit, but fhe has a naked power for the benefit of ftrangers only; thofe ftrangers can never claim under fuch a confideration, according to the cafe of *Thomlinfon* v. *Dighton*, *Salk.* 239. (*a*) 4 *Co.* 176.

(*a*) Rep. alfo, 10 Mod. 31. Com. Rep. 194. 1 P. Wms. 148. 2 Eq. Ca. Abr. 309. pl. 13.

As to the fecond point, they were all of opinion that the leffor of the plaintiff had a title. 1. Becaufe he is named in the deed. 2. Becaufe it is ftated that he was nephew to the covenantor. And though the deed does not mention him as fuch, yet being exprefsly named, he may aver himfelf within the confideration (1), according to *Mildmay*'s cafe, 1 *Co.* 176. 7 *Co.* 40. 11 *Co.* 23. Wherefore they gave judgment for the plaintiff.

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(1) The reafon for this opinion, as given in 2 *Barnard.* is, that the perfon being afcertained in the deed, an averment of a confideration, may be allowed, and it being ftated in the cafe that the plaintiff was nephew to the covenantor, they confidered that as a fufficient averment of a confideration. In conformity with which the report in *Fitzg.* ftates that Lord *Raymond* upon the firft argument was of opinion, *that the confideration mentioned in the deed, did not extend to the plaintiff*, and he ftates the doubt to be, whether, as the averment muft be not only that the plaintiff was of the blood of the covenantor, *but that the confideration was for the advancement of his family*, it can be made confiftently with the *fpecial confideration* mentioned in the deed. In *Peacock* v. *Monk*, 1 *Vez.* 128. Lord *Hardwicke* is of opinion, that where a deed ftates that it is made in confideration of a particular thing, that imports the whole confideration, and is a negative to any other. But perhaps a diftinction may arife where the confideration appears upon the face of the deed not to extend to all the ufes intended to be raifed by it, fince with refpect to fuch ufes it is the fame as if no confideration at all had been mentioned, and the averment of one to fupport them is no contradiction of the deed.

Pratt *verf.* Pratt. At the Rolls.

THE late Chief Juftice died leaving feveral children, and feifed of *Borough Englifh* lands. And having made no will, it became a point upon the ftatute of Diftributions, whether the youngeft fon fhould bring thefe lands into hotchpot, or was not to be confidered as an heir at law, who by the ftatute is to have a diftributive fhare without any allowance for lands by defcent.

Borough Englifh lands fhall be brought into hotchpot on the ftatute of Diftributions. Fitzg. 284. the arguments at the bar but no decifion. 2 Kely. 35. S. C.

 And

4/n 9 c 64

Lutwyche v. Lutwyche, post. Hil. term. 1734. contra (1).

And Sir *Joseph Jekyll* ruled, that he should allow for these lands. For he said the statute only intended to provide for the heir of the family, who is the common law heir, and not for one who is only heir by custom in some particular places.

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(1) Reported *Caf. temp. Talb.* 276. and that the present decree was reversed by Lord Chancellor *Talbot*, *ib.* 280. *Robinson on Gavelk. Appendix.*

Trinity Term

5 & 6 Georgii 2. In B. R.

Robert *Lord* Raymond, *Lord Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq*;

Sir Philip Yorke, *Knt. Attorney General,*
Charles Talbot, *Esq. Solicitor General.*

Rutherford *verſ.* Scott,

THE defendant coming up by *habeas corpus* from the Admiralty, appeared to be charged there at the ſuit of ſeveral owners, for embezzling the goods of the ſhip. And the plaintiff here making an affidavit that he was indebted to him on a promiſſory note, the court took him from the Admiralty, and ſent him to the marſhal. For they ſaid the cauſe in the Admiralty might as well be followed in an action of trover, and they paid no regard to the Admiralty method of ſending over a commiſſion to examine foreign witneſſes, which was a privilege that I urged the plaintiffs below could not have in this court.

If a ſuit is pending in *B. R.* againſt one in the Admiralty cuſtody, he muſt be turned over to the marſhal.

Burry *verſ.* Perry.

CASE for words ſpoken of a houſe-ſmith, *per quod* he loſt the cuſtom of *A. B.* and *C.* and 5 *s.* damages given. And ruled

Where no more coſts than damages.

L. Raym. 1588. 2 Barn. B. R. 79. 84. 113. 153. a. a. Kely. 71. S. C.

ruled there ſhould be no more coſts, the words being agreed to be actionable of themſelves (1).

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(1) *Woodhouſe* v. *Bidwell*, 2 *Keb.* 654. *Surman* v. *Sheleto*, 3 *Burr.* 1688. *Baker* v. *Hearn*, *Bull. L. N. P.* 11. S. P. *in B. R.* *Turner* v. *Horton*, *Barnes* 132. *Tiffin* v. *Glaſs*, *ib.* 142. *Collier* v. *Gaillard*, 2 *Black.* 1062. S. P. *in C. B. Denny* v. *Wigg*, *Pract. Reg.* 111. *Co. Caſ. Pr. C. P.* 139. is contra.

[937]

Read *verſ.* Chapman.

If the mate becomes maſter he can only ſue in the Admiralty for his wages as mate.
2 Kel. 226. pl. 178.
2 Barn. B. R. 160. S. C.

A Man went out mate, and in the voyage the maſter died, and he ſucceeded to the command of the ſhip. And having brought her home, he ſued in the Admiralty for his wages as mate, and for a further allowance after he became maſter. And the court granted a prohibition *quoad* the time he was maſter (1), and refuſed it *quoad* the time he was mate.

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(1) *Ragg* v. *King*, *ante* 858. S. P. in *Clay* v. *Snelgrave*, 1 *Ld. Raym.* 577.

Dominus Rex *verſ.* Roberts.

Conviction affirmed after death of the party.
1 Seſſ. Ca. p. 176. No. 158. S. C. but not S. P.

THE defendant being a bricklayer, was convicted for not building party-walls according to the ſtatute. And having brought a *certiorari*, died before argument. Notwithſtanding which the court would go on and affirm the conviction.

Dominus Rex *verſ.* Lowfield.

What amounts to bringing down an indictment to trial ſo as to ſave the recogniſance and coſts.
2 Kely. 69. S. C.

AN indictment for perjury being removed by *certiorari*, the defendant made up the record, and carried it down to the ſittings, with a *diſtringas*, and Mr. Attorney's warrant for a *tales*. There being a ſpecial jury, eleven only appeared. And the counſel for the proſecutor would not pray a *tales*, though the warrant was given them: and the counſel for the defendant not praying one, the cauſe was made a *remanet pro defectu juratorum*. And upon motion for coſts for not going on to trial, the court held, the defendant ſhould pay none, he having done all that was neceſſary to put the proſecutor in a capacity to try the cauſe, if he would (1).

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(1) *Vide Rex* v. *Righton*, S. P. where the defendant had a warrant and did not uſe it. 3 *Burr.* 1694.

Holt *verſ.* Ward Clarencieux.

Ante 850.

THE plaintiff declared, that it was mutually agreed between the plaintiff and defendant, that they ſhould marry at a future day, which is paſt, and that in conſideration of each other's promiſes, each engaged to the other; notwithſtanding which the defendant did not marry the plaintiff, but had married another, which ſhe lays to her damage of 4000 *l.*

An infant may ſue on a contract of marriage with a perſon of full age. Fitzg. 175. 275. 1 Barn. B. R. 277. 333. 348. 455. 2 Barn. B. R. 12. 173. 176. 3 Bac. Abr. 574. S. C. Et vide 3 Atk. 366.

The defendant with leave of the court pleaded double (*viz.*) *non aſſumpſit*, and that the plaintiff at the time of the promiſe was an infant of fifteen years of age.

The plaintiff joins iſſue on the *non aſſumpſit*, and a verdict is found for her, with 2000 *l.* damages. And as to the plea of infancy demurred.

[938]

This cauſe was ſeveral times argued at the bar, 1. By Mr. *Strange* for the plaintiff, and Serjeant *Chapple* for the defendant. When the court inclined ſtrongly with the plaintiff, becauſe though the defendant would not have the ſame remedy againſt her by action for damages, yet they thought he might have ſome remedy, *viz.* by ſuit in the eccleſiaſtical court, to compel a performance, the plaintiff being of the age of conſent: and that would be a ſufficient conſideration. And therefore appointed it to argument by civilians, to ſee what their law would determine in ſuch a caſe.

This remedy is taken away by 26 Geo. 2. c. 33. intituled an act for the better preventing of clandestine marriages. 1 Ch. 13. n. to 2d. ed.

Upon the arguments of the civilians, no inſtance could be ſhewn, wherein they had compelled the performance of a *minor's* contract. And they who argued for the defendant, ſtrongly inſiſted, that in the caſe of a contract *per verba de futuro*, (as this was) there was no remedy, even againſt a perſon of full age, in the ſpiritual court; but only an admonition. And the only reaſon why they hold juriſdiction in the caſe of a contract *per verba de præſenti* is, becauſe that is looked upon amongſt them to be *ipſum matrimonium*, and they only decree the formality of a ſolemnization in the face of the church.

After their arguments it was ſpoke to a fourth time by Mr. *Reeve* and Serjeant *Eyre*. And now this term the Chief Juſtice delivered the reſolution of the court.

The objection in this caſe is, that the plaintiff not being bound equally with the defendant, this is *nudum pactum*, and the defendant cannot be charged in this action. Formerly it was made

made a doubt by my Lord *Vaughan*, whether any action could be maintained on mutual promises to marry; but that is now a point not to be disputed. And as to the present case, we should have had no difficulty in giving judgment for the plaintiff, if we could have been satisfied by the arguments of the civilians, that as the plaintiff was of the age of consent, any remedy, though not by way of action for damages, could be had against her. But since they seem to have had no precedent in the case, we must consider it upon the foot of the common law. And upon that the single question is, whether this contract as against the plaintiff, was absolutely void. And we are all of opinion, that this contract is not void, but only voidable at the election of the infant: and as to the person of full age it absolutely binds.

5 Mod. 511. Salk. 457. Carter 236.

[939]

The contract of an infant is considered in law as different from the contracts of all other persons. In some cases his contract shall bind him; such is the contract of an infant for necessaries, and the law allows him to make this contract as necessary for his preservation; and therefore in such case a single bill shall bind him, though a bond with a penalty shall not. 1 *Lev.* 87.

Where the contract may be for the benefit of the infant, or to his prejudice; the law so far protects him, as to give him an opportunity to consider it when he comes of age: and it is good or voidable at his election. *Cro. Car.* 502. 2 *Roll.* 24. 427. *Hob.* 69 1 *Brownl.* 11. 1 *Sid.* 41. 1 *Vent.* 21. 1 *Mod.* 25. Sir *W. Jones* 164. But though the infant has this privilege, yet the party with whom he contracts has not: he is bound in all events. And as marriage is now looked upon to be an advantageous contract, and no distinction holds whether the party suing be man or woman, but the true distinction is whether it may be for the benefit of the infant; we think, that though no express case upon a marriage contract can be cited, yet it falls within the general reason of the law with regard to infants' contracts. And no dangerous consequence can follow from this determination, because our opinion protects the infant, even more than if we rule the contract to be absolutely void. And as to persons of full age, it leaves them where the law leaves them, which grants them no such protection against being drawn into inconvenient contracts.

Salk. 24.

For these reasons we are all of opinion that the plaintiff ought to have her judgment upon the demurrer.

Michaelmas Term

6 Georgii 2 Regis. In B. R.

Robert *Lord* Raymond, *Lord Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq*;

Sir Philip Yorke, *Knt. Attorney General.*
Charles Talbot, *Esq*; *Solicitor General.*

Hayward *verf.* Newton.

AN action was brought for thefe words fpoken of the plaintiff as a wine merchant, "You are a rogue, villain and "rafcal, and fell by fhort meafure;" and the jury gave twenty fhillings damages. And though it was thought a hard cafe, yet the court faid it has always been denied to fet afide a verdict for fmallnefs of damages. and therefore denied it in this cafe. *Quære tamen* why it is not within the reafon of fetting afide a verdict for exceffive damages (1). *Ante* 245.

Verdict not to be fet afide for fmallnefs of damages. Salk. 647. 2 Barn. B. R. 177. S. C.

(1) *Barker* v. Sir *Wolfton Dixie*, *poft*. 1051. *Mauricet* v. *Brecknock*, *Doug*. 509. S. P. *Secus* where it arifes from a miftake of the law either in the Judge or the jury. *Woodford* v. *Eades*, *ante* 425.

Ex dimiss' Lomax *versus* Holmden et al'.

Where access is presumed, yet evidence may be given of the impossibility of begetting children. Cited And. 9.

[941]

IN ejectment the question on a trial at bar was, whether the lessor was son and heir of *Caleb Lomax*, Esq; deceased, which depended on the question of his mother's marriage. And that being fully proved, and evidence given of the husband's being frequently at *London*, where the mother lived, so that access must be presumed; the defendants were admitted to give evidence of his inability from a bad habit of body (1). But their evidence not going to an impossibility, but an improbability only; that was not thought sufficient, and there was a verdict for the plaintiff.

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(1) *Vide ante* 925. *Pendrell* v. *Pendrell*, and the note.

Ball *verf.* Knight.

It is not a good custom for an inferior court to award a *tales de circumstantibus*. Fitzg. 274. 1 Barn. B. R. 453. 2 Barn. B. R. 164. 194. S. C.

ERROR of a judgment given in *Bristol* court, after a verdict for the plaintiff. And on the record it appeared, that seven of the panel were sworn, *et quia residui ejusdem jur' non comparuerunt ideo secundum consuetudinem civitatis prædictæ alii de circumstantibus per servientes ad clavam civitatis prædictæ ac ministros curiæ prædictæ ad hoc electi ad requisitionem præfati (quer') per mandatum curiæ hic de novo apponuntur quorum nomina in panello ultimo mentionato affilantur in curia hic secundum formam statuti in hujusmodi casu editi et provisi.* And then they join with the others, and give the verdict.

It was now objected, that this was error, it being a custom contrary to law. And 1 *Roll. Abr.* 563. *pl.* 15. was cited in point. Before the statute *Westm.* 2. all trials but in assises were at bar on the *venire*; and if a full jury did not appear, a *decem tales* was awarded. Then came the statute *Westm.* 2. *c.* 30. and gave a *nisi prius*. All trials are by *Magna charta* to be *per pares*, and 7 & 8 *W.* 3. *c.* 32. which appoints *tales* men to be taken out of some of the other panels, shews it was designed, the parties should have some knowledge of them; and that barely being a by-stander was not sufficient. A custom to try by six jurors is void, 1 *Roll. Abr.* 564. *pl.* 17. *Cro. Car.* 259. Here is no custom to challenge, and yet 35 *H.* 8. *c.* 5. and 14 *Eliz. c.* 9. which give a *tales* in superior courts, thought that reasonable. Many more cases were cited to prove from similar instances, that such a custom was illegal. *Dav.* 53. 1 *Roll. Abr.* 563. *pl.* 11. 13, 14. 564. *pl.* 20. *Dy.* 357. 1 *Roll. Abr.* 558.

558. *Dav.* 34. *b.* 1 *Sid.* 267. *Pal.* 211. *Mo.* 8. 2 *Inst.* 46. 2 *And.* 152.

It was further objected, that none but *liberi homines* could be jurors, whereas these standers-by might be aliens, infidels, &c. and they appear to have been sworn at the election of the plaintiff only.

E contra it was argued to be a good custom, being for the expedition of Justice. And to the express authority of 1 *Roll. Abr.* 563. *pl.* 15. was opposed 2 *Roll. Abr.* 672. *R.* 1. where it is entred otherwise, but with a *dubitatur.* And as to the objection that it is against law, it was answered, that all customs are so; the only question is if it be a reasonable alteration, and [942] that it is so, is proved from the statutes which have actually made this alteration with regard to superior courts. And 1 *Roll. Abr.* 564. *pl.* 16. 18. *Cro. Eliz.* 894. 1 *Mod.* 96. *Trials per pais* 69. were cited. And the allowance of a custom to devise before the statute *Hen.* 8. was relied on.

The court upon the first argument seemed strongly inclined for the custom. But afterwards the city counsel certifying, that they never have a *tales* in *London,* and the court taking notice that the judgment said to be reversed for this error in 1 *Roll. Abr.* 563. was in *Charles* the First's time, and is actually entered up; and the *dubitatur* in 2 *Roll. Abr.* 672. was in the time of *James* the First, and that this was not to be distinguished from the case of six jurors. They reversed the judgment.

Peak *vers.* Bourne.

A parish-clerk may execute the office by deputy without licence of the ordinary.

Quære whether a temporal or a spiritual officer, and whether he can appoint a deputy.

1 Barn. B. R. 377. 450. Fitzg. 105. 272. S. C. by the name of *Peat* v. *Birt,* the argument but no decision.

THE plaintiff declared in prohibition, that he was sued in the spiritual court for executing the office of deputy parish-clerk without the licence of the ordinary.

On demurrer three points were made: 1. Whether a parish-clerk be a temporal or a spiritual officer; 2. Whether he can make a deputy; and 3. Whether the licence of the ordinary is requisite.

It was argued three several times upon all the points. But the court in giving judgment founded themselves only upon the last, as to which they held that a licence was not necessary, and therefore gave judgment for the plaintiff in prohibition. They said the canon did not require it, and indeed it would be a transferring the right of appointment to all intents and purposes to

the ordinary: the *Institutio juris canonici* 22. says, He may be appointed *solo presbytero absque scientia episcopi.* 2 *Roll. Abr.* 286. *pl.* 44.

As to the other two points, the court strongly inclined that he was a temporal officer as to the right of his office, and that he might make a deputy.

For the first were cited 18 *E.* 3. 27. 13 *Co.* 70. 2 *Cro.* 670. *Pal.* 379. *Mar.* 101. 1 *Keb.* 286. 2 *Roll. Abr.* 285. *pl.* 37. 2 *Brownlow* 11. 1 *Lev.* 75. 1 *Vent.* 143. 2 *Lev.* 18. *Salk.* 536. *Godb.* 163. *Old. Bendl.* 142. 1 *Leon.* 94. *Fitzh. Annuity* 40. *Hugh's Parson's Law* 275. And when the
[943] court were pressed with their own authority in *Townshend* v. *Thorpe, ante* 776. they said it was a hasty opinion, into which they were transported by the enormity of the case (1).

For the second were cited 1 *Roll. Rep.* 274. *Mo.* 845. (3 *Bulst.* 77. 2 *Roll. Rep.* 274. 9 *Co.* 48.) That a constable may make a deputy: and the common distinction is between a judicial and a ministerial officer, as a parish-clerk certainly is.

(1) *Vide Gaudye's* case, 2 *Brownl.* 48. *Pitts* v. *Evans, post.* 1108. *Tarrant* v. *Haxby*, 1 *Burr.* 367. S. P.

Chapman *vers.* Lamb.

Goods that are not imported by way of merchandize pay no duty. 2 Burr. B. R. 168. 212. 2 Kely 231. S. C. more full. Trover lies against the officer who seizes and carries them away (1).

IN trover for fourteen shirts, a night-gown, and cap, a case was made for the opinion of the court. That the plaintiff arrived at *Dover* from *France*, and brought the goods with him as his own wearing apparel, and not as merchandize, or for sale; and the defendant seized them for non-payment of duty.

Ketelby for the plaintiff insisted, that by 13 & 14 *Car.* 2. *c.* 11. § 14. no goods are liable, but as such are imported as merchandize, and cited *Vaugh.* 165.

Reeve contra insisted, that the plaintiff is by this one importation a merchant within the 12 *Car.* 2. *c.* 4. and that the only test whether goods are imported as merchandize is, whether they are such as may be exposed to sale: at this rate every man may import his own wine, or silks for all his family. He said

(1) *Tinkler* v. *Poole*, 5 *Burr.* 2657. S. P.

the

the Attorney General insisted to speak to it, so the court ordered an *ulterius concilium*, though they inclined strongly for the plaintiff.

And this term Mr. Attorney came into court, and said that it being stated with negative words, that the goods were not imported as merchandize, it was too hard for him to maintain; but if it had stood only upon the words that he did not bring them in to sell, he would have contested it. So the plaintiff had judgment.

Maud *verf.* Branthwaite.

THE defendant being in custody, the plaintiff obtained judgment. And instead of charging him in execution, whereby he would be intitled to his discharge on the Lords' act; the plaintiff brought an action of debt upon the judgment, and charged him in custody. But on application to the court, when he had lain two terms after the judgment, the court discharged him on common bail, saying, It was a trick to deprive the defendant of the benefit of a merciful law (1). Practice. [944]

(1) *Vide Blandford* v. *Foot*, *Cowp.* 75.

Dominus Rex *verf.* Inhabitantes de Eckershall.

AN order was made on 7 & 8 *W.* 3. *c.* 29. for the parish at large to repair the highways, the 6 *d.* in the pound levied on the inship not being sufficient. And a *certiorari* being moved for, it was objected, that 3 & 4 *W.* & *M. c.* 12. had taken it away; to which it was answered, that this is an order founded on a subsequent law. *Sed per curiam*, They must both be taken together: the rate must be made in aid of the inship, by virtue of the former law. So a *certiorari* was denied. 3 & 4 W. & M. c. 12. 7 & 8 W. 3. c. 29. Certiorari, Highways. 1 Sess. Ca. p. 179. No. 163. S. C.

Lewis *verf.* Fog.

At Nisi prius *in* Middlesex, coram Raymond *Chief Justice.*

IN an action by the master for the defendant's dog's biting his apprentice, *per quod servitium amisit*, the Chief Justice allowed the apprentice to be a witness (1). Apprentice witness for master in action *per quod servitium amisit.*

(1) *Dunsley* v. *Westbrown*, *ante* 414. contra. But that the present decision is law, *vide Duel* v. *Harding*, *ante* 595. *Cock* v. *Wortham*, *post.* 1054.

Hilary Term

6 Georgii 2 Regis. In B. R.

Robert *Lord* Raymond, *Lord Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq;*

Sir Philip Yorke, *Knt. Attorney General.*
Charles Talbot, *Esq; Solicitor General.*

Dominus Rex *verf.* Davis.

Ha' cor' to remove a prifoner from *Wales* to an *Englifh* county. 2 Barn. B. R. 222. S. C.

A *Habeas corpus* was granted (without any affidavit) to remove the defendant from *Brecknock* gaol to *Hereford*, to take his trial there on an indictment; purfuant to the opinion in *Athoe*'s cafe, *ante* 553. that the adjacent *Englifh* county has a concurrent jurifdiction by the ftatute 26 *Hen.* 8. *c.* 4.

Lambert *verf.* Branthwaite.

The *folvendum* in a bond is a fufficient defcription of the obligee.

DEBT on bond: on *oyer* it appeared to be *teneri et firmiter obligari in viginti libris folvendis eidem Richardo Lambert.* And after verdict *pro quer'* on *non eft factum* pleaded, it was objected that there was no perfon to whom he was faid to be bound, or to whom *eidem* can refer. 1 *Lev.* 235. But on authority of 3 *Lev.* 21. the judgment was affirmed.

Dominus Rex *verſ.* Moore.

AN indictment for perjury was removed by *certiorari*, and the defendant paid coſts for not going on to trial: the proſecutor afterwards moved to quaſh it, which the court refuſed, unleſs he would ſubmit to pay coſts (1). *Strange pro defendente.* Court will oblige proſecutor in ſome caſes to pay coſts on quaſhing an indictment. 2 Kely. 103. S. C.

(1) *Vide Rex* v. *Webb*, 3 *Burr.* 1469.

Muſgrave *verſ.* Bovey.

A Prohibition was granted to a ſuit for theſe words, ſpoken by one clergyman of another, " You are an old rogue and " a raſcal, and a contemptible fellow, deſpiſed and hated by every " body" (1). *Cumb.* 253. What not a ſpiritual defamation. 2 Kely. 101. 103. S. C.

(1) *Coxeter* v. *Parſons*, *Salk.* *Gibſ. Cod.* 1025. 2 *Burn's Eccl.* 692. *Hall* v. *Downes*, *Com.* 309. *Law* 119.

Oliver *verſ.* Lawrence.

A Rule to anſwer the matter in an affidavit was diſcharged on my motion, becauſe on the affirmation of a Quaker, and this is a criminal proſecution. *Ante* 441. 527. 872. No rule to anſwer on the affirmation of a Quaker.

Jenys *verſ.* Fawler et al'.

At Guildhall, coram Raymond *Chief Juſtice.*

IN an action by the indorſee of a bill of exchange againſt the acceptor, it was held not to be neceſſary, to prove the hand of the drawer: and the plaintiff reſted on the proof of the acceptance. The defendant offered to prove it a forged bill, by calling perſons who were acquainted with the hand of the drawer, and would ſwear they did not believe it to be his hand. But the Chief Juſtice would not admit this, from the danger to negotiable notes, and becauſe a man might with deſign write contrary to his uſual method. And he ſtrongly inclined, that even actual proof of forgery would not excuſe the defendants againſt their The acceptor cannot ſet up a forgery of the bill.

their own acceptance, which had given the bill a credit to the indorsee (1). *Strange pro quer'*, who had a verdict.

(1) *Price* v. *Neale*, 3 *Burr.* 1354. In *Smith* v. *Chester*, 1 *Term Rep.* 654. *acc.* In *Cooper* v. *Le Blanc*, *post.* 1051. the inclination of Lord *Hardwicke*'s opinion was *contra*; and the opinion of Lord *Raymond* himself in *Wilkinson* v. *Lutwidge*, *ante* 648. unless a distinction arises where the action is brought by the payee against the acceptor, (as that case seems to have been); and where it is brought by an indorsee for a valuable consideration as is the present.

Dominus Rex *vers.* Smith.

Excom' cap'. Vide post. 950.

AN *excommunicato capiendo* was quashed for incertainty being in *causa defamationis sive convicii*, which last is too loose a word. *Vide Litt. Dict.* *Strange pro defendente.*

[947]

Launder *vers.* Cripps.

What a miscontinuance.

BILL in *C. B.* against an attorney, where the proceedings are on a day certain. And after judgment by default, the writ of inquiry was returnable at a general return, and this was objected on error. *Strange contra* insisted it was but a misconti- nuance, and cured by 32 *Hen.* 8. *c.* 30. and 4 & 5 *Ann.* *c.* 16. and it was so determined *Rex* v. *Episcopum Miden'*, *ante* 62. On the authority of which case the judgment was affirmed.

Lockyer et al' *vers.* Savage et al'. In Scaccario.

The child of a freeman of *London* when of age may in consideration of a present fortune bar herself of her customary part. 2 Eq. Abr. 260. 4 4.

THE plaintiffs brought a bill as assignees of a commission of bankruptcy against *Norris*, to have an account of the personal estate which the bankrupt's wife's father died possessed of, he being a freeman of *London*.

The defendants insisted, that by articles between the bankrupt and *Freeman* and his daughter, previous to the marriage, she had in consideration of 4000 *l.* advanced by the father in his life-time, released her right to any farther demand out of the personal estate; and that the 4000 *l.* was settled to the use of the bankrupt for life, but if he failed in the world, the trustees were not to pay the produce to him, but apply it to the separate maintenance of the wife and children.

Upon

Upon the hearing two points were ruled, 1. That a child of full age might, for the consideration of a present advancement, bar herself of the customary share (1). And that it was stronger in the case of a child who had a right, than in the case of an intended wife, which had been allowed. 2 *Vern.* 665. 2. That the provision for her maintenance in case the husband failed, was good against creditors; it not being a provision out of the bankrupt's estate, but the settlement of her own fortune. *Abr. Equ. Caf.* 53, 54. And though it was objected, that the profits were forfeited by the act which was to vest the separate right in the wife, *viz.* bankruptcy; and when two rights concur, *fortior est dispositio legis quam hominis* (2): yet the court compared it to the case of a lease, where the lessee is restrained from assigning without consent of the lessor, and the assignment has always been held to be void (3). The bill was dismissed with costs. *Strange pro defendente.*

The fortune of a wife may be settled or. husband till he fails, and then to her separate use.

(1) But if the father oblige his child to release for the sake of maintenance it is void, as a fraud upon the custom. *Heron* v. *Heron*, 2 *Atk.* 160, *Vide Metcalf* v. *Ives*, 1 *Atk.* 63. that if the wife *be under age*, and the husband and she, in consideration of a marriage portion covenant to release, the wife's orphanage share, the husband's covenant would be considered in equity as an absolute release and extinguish the wife's right.

(2) See *Tully* v. *Sparkes*, *ante* 867. and the cases cited *n.* 1.

(3) *Roe* v. *Galliers*, 2 *Term Rep.* 133. and see the cases cited *Cooke's Bank. Law.* 3 *ed.* 448.

Eafter Term

6 Georgii 2 Regis. In B. R.

N. B. *The Lord* Raymond *dying the laft vacation, there was no Chief Juftice this term.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Juftices.*
William Lee, *Efq*;

Sir Philip Yorke, *Knt. Attorney General.*

Charles Talbot, *Efq*; *Solicitor General.*

Memorandum : All writs were directed to Mr. Juftice *Page*, and *tefte* in his name.

Cafe of the Borough of Calne in Wilts.

Mandamus. AFFIDAVIT being made, that the fteward who keeps the publick books had refufed to produce them at the corporate meeting, to enter the elections of their members; a *mandamus* was granted to him, to attend with the books at the next corporate affembly (1).

(1) *Vide Rex* v. *Wilkman, ante* 879.

[949] Cafe of the Borough of Evefham.

Mand. mus. THE cuftom is to give 24 hours notice of an election: a *mandamus* was granted to chufe a capital burgefs. And it was moved on the other fide to fix a day, or that it might be on

on ſix days notice. But the court would give no directions, ſaying they could not alter the conſtitution of the borough.

Baker *verſ.* Weſtbrooke.

Plead double.

IT was refuſed to let the defendant plead *non aſſumpſit*, and a tender (1).

(1) *Maclellan* v. *Howard*, 4 *Term Rep.* 194. *Kay* v. *Patch*, 27 *Geo.* 3. *B. R.* cited *ib. S. P.* See alſo *Jenkins* v. *Edwards*, 5 *Term Rep.* 97. But *Whaley.* v. *Harriſon*, *Barnes* 360. ſeems *contra* See all the caſes concerning pleading double under the ſtatute for the amendment of the law collected. 5 *Com. Dig.* Pleader. (E. 2.) 388.

Horne *verſ.* Buſhell.

After affirmance no writ of error *coram vobis* is a *ſuperſedeas* without motion. 2 Barn. B. R. 253, 260, 262. S. C.

ERROR was brought of a judgment in the *Marſhalſea* court, and error in law aſſigned, and the judgment affirmed. Then a writ of error *coram vobis*; which the court ſaid could not be allowed without leave, and therefore held it no *ſuperſedeas*. *Ante* 690.

Macarty *verſ.* Barrow.

Bankrupt. 2 Barn. B. R. 251, 255. 3 Wilſ. 17. 2 Kely. 239. pl. 191. S. C.

THE defendant in *January* 1728. drew bills on *Spain*, which in *March* were returned proteſted for non-acceptance; between the drawing and return he became a bankrupt: and being ſued to execution as the drawer, he moved on the act 5 *Geo.* 2. *c.* 30. § 7. to be diſchaged, it being a debt contracted before his bankruptcy.

Strange contra inſiſted, that this cauſe of action aroſe upon the non-acceptance and proteſt, which are both neceſſary to be averred in order to maintain the action, and the charges thereof are to be recovered.

Sed per curiam, The principal is the drawing the bills (1), and therefore he muſt be diſcharged. *Quære tamen.*

(1) The reaſon as given more fully in the other reports is, that the debt is contracted by drawing the bills, and that the non-acceptance &c. raiſes no debt, but is merely a notice to the drawer that

that the drawee will not pay. Upon this principle it has been held, that if a bill of exchange be not accepted, an action will lie against the drawer before it is made payable. *Bright* v. *Purrier*, *Bull. L. N. P.* 269. *Milford* v. *Mayor*, *Doug.* 54. 3 *ed. S. P.* and that the indorsee of a promissory note may be discharged under an insolvent act. (12 *Geo.* 3. *c.* 23. § 21.) which takes place before it becomes due. *Harman* v. *Leake*, *Cowp.* 22. The present case is more fully reported and the authority of it recognized by *Wilmot* C. J. 3 *Wils.* 17. and said that the court held that 7 *Geo.* 1. *c.* 31. extended to it. The point therefore appears to be settled.

Trinity Term

6 Georgii 2 Regis. In B. R.

No Chief Justice.

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq*;

Sir Philip Yorke, *Knt.* *Attorney General.*
Charles Talbot, *Esq*; *Solicitor General.*

Leehill *verſ.* Sir Thomas Reynell.

IT was ruled that the election in amending, to pay coſts or give an imparlance, was in the defendant, and not in the plaintiff: and ſaid to be the practice of *C. B.*

Practice: 1 Lill. Prac. Reg. 70, 475. Comb. 58. acc. Vide 2 Keb. 120, 363. 1 Keb. 175, 428.

Dominus Rex *verſ.* Keat.

THE court refuſed to quaſh an *Engliſh excommunicato capiendo* that was for ſlander *or* defamation, ſaying that was not uncertain as *convicium* was.

Excommunicato capiendo. 2 Kely. 132. S. C. Vide ante 946.

Between the Pariſhes of Lidney *and* Stroud in Glouceſter.

UPON a ſpecial order of ſeſſions it was ſtated, that a maid was hired for a quarter of a year, and if ſhe and her maſter liked one another, ſhe was to continue the whole year,

Poor. Burr. Sett. Ca. 1. and Seſſ. Ca. Ed. 1750. p. 175. Bott. by Conſt. 2 vol. 411. S. C. 211. vol. 1. no. all more full.

and have 3 *l.* for her year's wages: that ſhe ſtaid the year out, and had her 3 *l.* And this on debate was held to be a ſettlement (1).

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(1) *Rex* v. *New Windſor*, *Burr.* S. C. 19. *Rex* v. *Atherton*, *ib.* 203. *poſt.* 1182. *Rex* v. *St. Ebbs*, *ib.* 289, *S. P.* and *vide* the opinion of *Foſter* J. that theſe caſes have carried the matter as far as poſſible. *Rex* v. *Ilam*, *ib.* 306.

[951]

Gambier *verſ.* Wright.

Where a priſoner is removed from *B. R.* to *C. B.* there is no need in action of eſcape to ſhew a proceſs againſt him in *C. B.* 2 Kely. 115. 2 Barn. B. R. 257. S. C. more full.

ERROR of a judgment in *C. B.* in an action of eſcape againſt the warden of the *Fleet*: and the declaration ſet out, that *William Wilkinſon* being indebted to the plaintiff in 200 *l.* for goods ſold and delivered, he ſued out a *latitat* againſt him, by virtue whereof he was arreſted, and committed to the marſhal, from whence he was carried by *habeas corpus* before Mr. J. *Denton*, a Judge of *C. B.* who committed him to the *Fleet* charged with the plaintiff's *latitat*, and the plaintiff ſued him to judgment, and then the defendant permitted him to eſcape. On Not guilty pleaded there was a verdict and judgment for the plaintiff.

Serjeant *Hawkins* for the plaintiff in error argued, that the priſoner being in cuſtody of *B. R.* could not be taken from thence without ſome proceſs in *C. B.* which ought to be ſet out, and without which the Judge had no power to commit him. And if he was there illegally, the warden was in the right to let him go. And he cited 1 *Roll. Rep.* 217, 276. *Cro. El.* 223. 31 *H.* 6, 10. *Lutw.* 1468. *Mo.* 274. 2 *Leon.* 84. 2 *Bulſt.* 62. *Cro. El.* 877. *Cro. Jac.* 394. *Salk.* 273, 700.

Deniſon contra. In the caſe of a ſuperior court you will not preſume they act without juriſdiction, and the *habeas corpus* gave it. The plaintiff is a ſtranger to the other's writ, and therefore not to be expected to ſet it out: all the precedents are in this manner. *Lev. Ent.* 56. *Vide* 181, 194. 2 *Brown. Ent.* 13, 14. *Rob. Ent.* 307. *Lill. Ent.* 157, 188. Beſides, this is but error in proceſs, of which the warden can take no advantage. 2 *Saund.* 100.

The court ſtrongly inclined the declaration was well enough, but ordered an *ulterius*; and this term I declining to argue it for the warden, the judgment was affirmed of courſe.

Duckett *verſ.* Martin.

PENDING error to reverſe an outlawry on *meſne* proceſs, the defendant in error moved to quaſh the writ, becauſe no bail was given. *Sed per curiam*, That is never done till the outlawry is reverſed; and then we take bail to appear to an original to be brought within two terms. And ſo it was done in this caſe (1).

No bail in error of an outlawry till reverſal. 2 Barn. B. R. 286, 298. S. C.

(1) As this caſe is cited in 1 *Wilſ.* it is ſaid that ſpecial bail was put in upon error to reverſe the outlawry, and in the report in *Barnard.* 298. it ſaid that the court refuſed to reverſe the outlawry till bail had juſtified. *Vide Serecold* v. *Hampſon*, *poſt*. 1178.

Dominus Rex *verſ.* Biddle et Taylor. [952]

INFORMATION in the nature of a *quo warranto* for exercising the office of capital burgeſs of *Eveſham*, and charging an uſurpation from 20 *Auguſt* to the firſt day of *Hilary* term laſt. The defendant confeſſes an uſurpation from 20 *Auguſt* to 29 *September*, and from thence inſiſts on an election. The proſecutor replies as to the election. And on the trial a ſpecial verdict is found; and as to the time confeſſed, he enters up judgment of *ouſter*, according to the opinion given in the mayor of *Penryn*'s caſe, *ante* 582. and the words of 9 *Ann. c.* 20. § 5. which warrant ſuch a judgment, where the defendant is adjudged guilty of an uſurpation.

Where the defendant confeſſes an uſurpation for part of the time only, there can be no judgment of *ouſter*. 2 Kely. 272. 2 Barn. B. R. 238, 280, 316, 320. S. C. and the note.

The defendant moved that all the judgment but that of a *capiatur pro fine* might be expunged; which the court ordered to be done, as the proper puniſhment for his acting before duly elected. But ſaid it would be hard that a ſubſequent good election ſhould be done away, as it would be by this judgment. They diſtinguiſhed it from *Pender*'s caſe above, where he was guilty of an uſurpation during all the time charged in the information.

Horne *verſ.* Booſey.

At Guildhall coram Page *J.*

ONE not the proper officer ſeized brandy going with a permit, and carried it to the King's warehouſe, and on information in the Exchequer it was condemned.

Where a condemnation in the Exchequer is concluſive and where not.

In

In trover *Page* J. held, that if a proper officer had ſeized, he would not examine the property in this action, for the owner ought to claim in the Exchequer. But he conſidered this as a ſeizure by a ſtranger, the defendant being a tideſman, who could not enter a houſe without a writ of aſſiſtance and a peace officer, the words of his warrant being ſo reſtrained; and becauſe this was not rightly in the King's warehouſe, he directed the jury *pro quer'*. The jury found *pro quer'* for brandy and caſks (1).

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(1) *Vide Tinkler* v. *Poole*, 3 *Wilſ*. 146. 5 *Burr*. 2657. *S. C.* and *Scott* v. *Shearman*, 2 *Black*. 977.

Michaelmas Term

7 Georgii 2 Regis. In B. R.

This term Sir Philip Yorke *was made Chief Justice, and created a Peer, by the title of Baron* Hardwicke *of* Hardwicke *in the county of* Gloucester.

Sir Francis Page, *Knt.* }
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq;* }

Charles Talbot, *Esq; Solicitor General.*

Dominus Rex *verf.* Jocamb.

THE court held that a *qui tam* information is not to be quashed on motion (1).

Qui tam not quashable. 1 Sess. Ca. p. 228. no. 185. p. 241. no. 191. 2 Barn. B. R. 311, 323, 339. S. C.

(1) *Reg.* v. *Potter, And.* 217. *Rex* v. *Holmes, ib.* 216. *Garland* v. *Barton, post.* 1103.

Barfoot *verf.* Reynolds et al'.

TRESPASS, assault and battery against *Reynolds* and *Westwood. Reynolds* pleaded *son assault:* and *Westwood* pleaded, that he was servant to *Reynolds* the other defendant, and that the plaintiff having assaulted his master in his presence, he in

How the servant is to justify an assault in defence of his master. 2 Kely. 134. 2 Barnard. 327. S. C. 11 H. 6. 16. 14 H. 6. 24. 2 Roll. Abr. 546. Bro. Tresp. 283.

in defence of his master struck the plaintiff. And on demurrer the plea was held ill, for the assault on the master might be over, and the servant cannot strike by way of revenge, but in order to prevent an injury; and the right way of pleading is, that the plaintiff would have beat the master, if the servant had not in-
[954] terposed, *prout ei bene licuit.* The plaintiff had judgment.

Cowne *verf.* Barry.

What comes under a *fcilicet* rejected.
2 Kely. 135. S. C.
Ante 622.

DEBT upon a bond; the defendant pleaded payment before the day. And it being found for the plaintiff, the court inclined to award a repleader, according to the case of *Merril* v. *Jocelyn*, *Trin.* 13 *Ann.* But it being observed at another day, that the time of payment was only alleged under a *fcilicet*, the court held it a good plea on the act for amendment of the law, as a payment before exhibiting the bill; and then the iffue joined was material. And the plaintiff had judgment.

Bates *verf.* Pettipher.

How the forty miles diftance from *London* is to be computed as to notice of trial.
2 Barn. B. R. 331. S. C.

THE defendant lived at *Aylefbury*, and not having fourteen days notice of trial, moved to fet afide the verdict, upon an affidavit that it meafured forty-two miles from *London*, and paid for fo many poft.

On the part of the plaintiff it was fworn, that it was computed to be but thirty-three miles. *Et per curiam*, We muft go by the ufual computation; our rule was ancienter than thefe poft miles, and confequently refpected the computation, before the erection of poft miles. It was therefore held that the notice was good (1).

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(1) *Ofgood* v. *Lyon*, *poft.* 1216. *S. P.*

Bifhop *verf.* Stacy.

Amendment after fpecial demurrer.
2 Barn. B. R. 298.
2 Kely. 121. S. C. but not S. P.

AFTER a fpecial demurrer, and joinder, and argument, the plaintiff had leave to amend by the bill upon the file. And this was granted upon debate (1).

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(1) *Vide Robinfon* v. *Raley*, 1 *Burr.* 321. and *Rex* v. *Betts*, *ante* 686. amendment of a plea after demurrer upon the crown fide.

Warriner *verſ.* Giles.

Leave given to inſpect books in which boundaries are entered.

AFTER the fire of *London*, power was given to the city to ſet out the publick markets, which was done in a very accurate manner, and entered in their books. An ejectment was brought by the leſſee of one of the markets, wherein the boundaries were in queſtion. And it was moved on behalf of the plaintiff, to have liberty to inſpect the books, and take co- [955] pies; which was granted. And the court compared it to the caſe of court rolls, which are not conſidered as the evidence of the lord, but in the nature of publick books, for the benefit of the tenant as well as the lord (1).

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(1) *Vide Rex* v. *The Fraternity of Hoſtmen in Newcaſtle, poſt.* 1223. and the caſes cited in the note.

Dominus Rex *verſ.* Dempſon.

Father not bound to maintain the ſon's wife.

ORDER upon the father to maintain the ſon's wife, after a divorce *a menſa et thoro* for adultery, was quaſhed on the authority of the *King* and *Munden*, *Trin.* (*Geo.* 1. *ante* 190.) ſhe not being a natural relation of the father.

1 Seſſ. Ca. p. 230. No. 187. 2 Barn. B. R. 329. 364. 1 Bott by Conſt. 324. pl. 410.

Smith *verſ* Smith. At Niſi prius.

A parol gift without ſome act of delivery will not alter the property.

THE plaintiff's inteſtate lodged at the defendant's houſe, and had furniture and plate there, and was proved to have ſaid, that whatever he brought into thoſe lodings he never intended to take away, but gave directly to the defendant's wife. And now in trover for the goods which were there at the inteſtate's death, it was ruled, that a parol gift, without ſome act of delivery, would not alter the property, and that ſuch an act was neceſſary to eſtabliſh a *donatio cauſa mortis*. Upon this opinion it came to the queſtion, whether there was any delivery. And to prove one, the defendant ſhewed, that the inteſtate, when he went out of town, uſed to leave the key of his rooms with the defendant; and that was inſiſted to be ſuch a mixed poſſeſſion, that the law will adjudge the poſſeſſion to be in him who has the right. And the Chief Juſtice ruled it ſo, and the jury found for the defendant.

Thomas et al' *verſ.* Biſhop.

Action lies againſt a ſervant upon a bill drawn on him and accepted generally, though the order is to place it to place it to the account of the maſter.
2 Barn. B. R. 320, 335.
2 Kely. 136.
Ann. 1. S. C.

THE plaintiffs were indorſees of a bill of exchange drawn from *Scotland* upon the defendant, in theſe words, "At "thirty days ſight pay to *J. S.* or order 200*l.* value received of "him, and place the ſame to account of the *York Buildings* com"pany, as *per* advice from *Charles Mildmay.* To Mr. *Humphry* "*Biſhop*, caſhier of the *York Buildings* company, at their houſe "in *Wincheſter-ſtreet, London.* Accepted 13 *June* 1732. *per* "*H. Biſhop.*"

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This bill not being paid, an action was brought againſt the defendant upon his acceptance. And the defendant proved, that the letter of advice was addreſſed to the company; and that the bill being brought to their houſe, he was ordered to accept it, which he did in the ſame manner as he had accepted other bills. But Mr. J. *Page*, who tried the cauſe, directed the jury to find for the plaintiff, which they did accordingly.

And now upon motion for a new trial, the court held, that the direction was right. For the bill on the face of it imports to be drawn upon the defendant, and it is accepted by him generally, and not as ſervant to the company, to whoſe account he had no right to charge it till actual payment by himſelf. And this being an action by an indorſee, it would be of dangerous conſequence to trade, to admit of evidence ariſing from extrinſic circumſtances, as the letter of advice. And they ſaid, this differed widely from the caſe of a bill addreſſed to the maſter, and under-wrote by the ſervant; where undoubtedly the ſervant would not be liable, but his acceptance would be conſidered as the act of his maſter. A bill of exchange is a contract by the cuſtom of merchants, and the whole of that contract muſt appear in writing. Now here is nothing in writing to bind the company, nor can any action be maintained againſt them upon the bill: for the addition of caſhier to the defendant's name is only to denote the perſon with more certainty, and the *York Buildings* houſe is only to inform the order, where the drawee is to be found; and the direction whoſe account to place it to, is for the uſe of the drawee only. And they compared it to the caſe in *Carth.* 5. 2 *Vent.* 307. where a bill was drawn payable to *Price*, for the uſe of *Calvert*, and held that the legal property was in *Price*, which is ſtronger than the preſent caſe. They ſaid it might be otherwiſe if the action had been by *J. S.* who was privy to the tranſaction, and it had appeared he tendered the bill as a bill on the company. But this plaintiff being a ſtranger, they could not conſider thoſe circumſtances. The plaintiffs had their judgment. *Strange pro def'.*

Dominus Rex verſ. Betteſworth.

JOHN Kynaſton, Eſq; made his will, and two perſons executors, and left the reſidue of his perſonal eſtate to his youngeſt ſon Edward. The executors renounced, and the reſiduary legatee moved for a *mandamus*, to be admitted to prove the will, and have adminiſtration with the will annexed. And a rule was made to ſhew cauſe. At the day it was inſiſted on, that this caſe differed * from Lord *Londonderry*'s, *Hil.* 3 *Geo. ante* 857. where the commiſſion of appraiſement was ſet up againſt the immediate grant of a probate, which the ſtatute 21 *H.* 8. *c.* 5. requires ſhall be without any fruſtratory delay. And the ordinary has no election there; whereas in the preſent caſe he is not bound to grant the adminiſtration to the reſiduary legatee, none of the ſtatutes mentioning him; on the contrary the 21 *H.* 8. *c.* 5. which takes notice of the renunciation of executors, leaves the matter to the election of the ordinary. And of this opinion was the court, who ſaid, if the commiſſion of appraiſement was a *gravamen*, it would be proper matter of appeal; but they could not break into the practice of the court below. And Lord *Hardwicke* mentioned a caſe in chancery before Lord *Macclesfield*, between *Wheeler* and *The Archbiſhop of Canterbury*, where it was held, that theſe ſort of adminiſtrations are not within the ſtatute of Diſtributions, which brings it to *Smith*'s caſe, *Hil.* 4 *Geo.* 2. (*ante* 892.) where a *mandamus* to grant adminiſtration *durante minori ætate* of an executor, to the father of the executor, was refuſed; becauſe there was no law obliging the ſpiritual court ſo to do. The rule for a *mandamus* was diſcharged. *Strange pro Kynaſton.*

The ſpiritual court may award a commiſſion of appraiſement before granting adminiſtration with the will annexed.
2 Kely. 139. 2 Barnard. 334. 3 Bac. Abr. 535. S. C.

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Ante 857.

Ruding verſ. Newell.

IN an action for a falſe return to a *mandamus*, the queſtion was, whether the office of regiſter to the archdeacon had been uſually granted for three lives. And in order to prove the uſage, it was offered to be given in evidence, that other archdeacons in the ſame dioceſe had made grants for three lives, as the plaintiff's grant was. But the Chief Juſtice refuſed to admit this evidence; and compared it to the caſe of cuſtomary manors, where the cuſtoms of other manors are never allowed, except in the North of *England*, where they are conſidered as border laws, and an evidence of the law of the country (1).

Cuſtoms in other manors or archdeaconries not to be given in evidence.

Ante 662. and the caſes cited in the note.

(1) See *Furneaux* v. *Hutchins*, *Cowp.* 807.

Darby *verſ.* Wilkins.

Money due by firſt inſtalment may be brought in, but not to ſtay the plaintiff from ſigning his judgment.

A Bond was conditioned to pay 100*l.* by ſeveral inſtalments; and the firſt payment not being made, the bond was put in ſuit. The defendant before judgment moved to bring in the firſt payment with intereſt and coſts; which the plaintiff was willing to accept, but inſiſted, that as the bond was forfeited, he had a right to ſign his judgment; and ſubmitted to be bound by rule, not to take execution for more than was at preſent due, till another payment ſhould accrue. The defendant on the other hand inſiſted, that by 4 *Ann. c.* 16. he was at liberty to bring

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in the money at any time pending the action. *Sed per curiam,* That plainly relates to the caſe of bringing in all the money reſerved by the condition, becauſe it ſays the bond ſhall be abſolutely diſcharged. However within the equity of that ſtatute it has been allowed to bring in the money due on the inſtalments. But then it is reaſonable, we ſhould take care not to prejudice the plaintiff, who will have a legal advantage by ſigning judgment. Therefore let him ſign his judgment (1), but not to take out execution, until the payments become due.

Ante 814.

N. B. Mich. 11 Geo. 2. Lucas *v. London, Held, paying all the paſt inſtalments with intereſt and coſts, ſufficient*; *and money not yet due, ordered out of court, to the party who brought it in.*

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(1) *Moſs,* adminiſtrator, v. *Hardy, Barnes* 288. *videtur contra.*

Gore *verſ.* Gore.

What a good executory deviſe. 2 Will. Rep. 28. 10 Mod. 501. 9 Mod. 4. 2 Kel. 254. 2 Barn. K. B. 209. 229. 355. 2 Eq. Ca. Ab. 339. pl. 12.

A Caſe was ſent from Chancery to the King's Bench, wherein it was ſtated, that *William Gore* being ſeiſed in fee, deviſed to truſtees and their heirs, to the uſe of the truſtees for 500 years, to raiſe younger childrens' fortunes and pay debts (1), and after the determination of that eſtate, then to the firſt and every other ſon of *Thomas Gore,* the deviſor's eldeſt ſon, in tail male, remainder to *Edward Gore* his ſecond ſon (and in being) in tail male, with remainders over. That at the death of the deviſor, *Thomas Gore* had no ſon, but ſince his deceaſe the defendant was born. And upon this the queſtion was, whether the firſt ſon of *Thomas Gore* could take this eſtate by way of ex-

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(1) There was alſo a truſt to pay an annuity of 50*l.* to *T. G.* for life.

ecutory devise; for it was agreed, it could not enure to him by way of contingent remainder, there being no estate of freehold to support it.

This case was argued in Chief Justice *Pratt's* time at his chamber before him and the three Judges. And they certified their opinions to Lord *Macclesfield*, that it was not a good executory devise, because it might subsist forty weeks after the death of *Thomas Gore*, and they were not for going a day farther than a life in being (2). *For the arguments of all the counsel see 2 Kel. 254. pl. 203. See also 2 P. Wms. 28.*

The Chancellor not being satisfied with this opinion, refused to decree accordingly. And he being succeeded by Lord *King*, the case was sent back to *B. R.* (3). And now they were unanimously of opinion; that it was a good executory devise, and that a convenient time after the life was to be allowed, according to the case of *Lloyd* v. *Cary*, in *Show. Parl. Cases* (4). And this necessarily being to arise within nine months after the death of *Thomas*, there was no danger of a perpetuity. And this being certified, the cause was set down before Lord *Talbot* after *Trinity* term 1734 (*a*), who declared his agreeing in opinion with the last certificate, and made his decree accordingly (5). (*a*) 8 Vin. Abr. tit. Devise, (U. 6.) 370. n.

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(2) The ground upon which this opinion of its not being a good executory devise was founded, is stated in *P. Wms.* 63. to be, "that it was not to take place till after the determination of 500 years. *Vide* also 2 *Kely.* 256, 257. *Fearne on Cont. Rem.* 3 ed. 315, 316.

(3) *Vide Utterson* v. *Vernon*, 3 *Term Rep.* 539. 4 *Term Rep.* 570. where this was done likewise.

(4) Lord *Raymond* was also of this opinion. 2 *P. Wms.* 62. 2 *Kel.* 257.

(5) An executory devise limited to take effect within 21 years after a life or lives in being, is good. 2 *Black. Com.* 174. *Vide Fearne's Essay on Contingent Remainders*, 3 ed. 318. 406. *Doe* v. *Fonnereau*, and the notes, *Doug.* 487. 1 *P. Wms.* 98. *Coxe's* edition, for the several cases and distinctions upon this subject.

Hilary Term

7 Georgii 2 Regis. In B. R.

Philip *Lord* Hardwicke, *Lord Chief Juſtice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Juſtices.*
William Lee, *Eſq*;

John Willes, *Eſq*; *Attorney General.*
Dudley Ryder, *Eſq*; *Solicitor General.*

Deſbordes *verſ.* Horſey.

Upon what bonds bail is required on error. 2 Barn. B. R. 389. 2 Kely. 181. S. C.

THE condition of a bond was for the payment of 500*l.* at ſuch a day, being the ſame ſum mentioned in certain indentures of ſuch a date. And error being brought, the plaintiff in error would have been excuſed from giving bail, becauſe the words of 3 *Jac.* 1. *c.* 8. are, *bonds for payment of money only*, whereas this was rather a bond for performance of covenants. But the court held, that bail ought to be given; for the material part of the condition was the payment of 500*l.* and the other words were only added to ſhew they were not diſtinct debts, but only different ſecurities for the ſame. *Ante* 476. *Thrale* v. *Vaughan*, *poſt.* 1190.

Jefferies *verſ.* Dyſon. At Guildhall.

IN treſpaſs for *meſne* profits, the plaintiff offered a recovery in ejectment againſt the caſual ejector, upon which no writ of poſſeſſion had iſſued. And when the defendant would have gone into the title, inſiſted he was eſtopped by the judgment. But the Chief Juſtice held, that though it would have been an eſtoppel, if the preſent defendant had been made a defendant in the ejectment, and the verdict againſt him; yet this judgment, to which he was no party or privy, could be none; and therefore admitted the defendant to controvert the title (1).

Where judgment is againſt the caſual ejector, the title may be gone into in action for meſne profits.

(1) *Sed vide Decoſta* v. *Atkins*, *Hil.* 4 *Geo.* 2. *coram Eyre* C. J. that the tenant in poſſeſſion cannot controvert the plaintiff's title, unleſs the latter goes for the profits for a time longer than what is contained in the demiſe. *Bull. L. N. P.* 87. See alſo *Aſlin* v. *Parkin*, 2 *Burr.* 665. *Barnes* 472. *Bull. L. N. P.* 87. S. C.

Law *verſ.* Law.

DEBT upon a bond conditioned for payment of money at a future day. The defendant pleaded payment at the day: and before the plaintiff replied, moved to withdraw this plea, and plead the ſtatute of 5 *E.* 6. *c.* 16. againſt the ſale of offices. *Sed per curiam*, That is never done, but in order to plead the general iſſue; not to ſubſtitute one ſpecial plea in the room of another. So the motion was denied (1). *Vide Trin.* 5 *Geo.* 2. (*ante* 906. *Meard* v. *Philips*) where the general iſſue was waived, and leave given to plead double.

Cannot withdraw ſpecial plea, but in order to plead the general iſſue. 2 Barn. B. R. 390, 401. 2 Kely. 181. pl. 148. S. C.

(1) *Hare* v. *Lloyd*, 1 *Term Rep.* 693. *Prout* v. *Dewar*, *ib. n.* *Cockran* v. *Robertſon*, *id. ib.*

Clews *verſ.* Bathurſt. At Niſi prius in Midd.

ACTION for maliciouſly procuring the plaintiff's wife to exhibit articles of the peace againſt him, and for living with her in adultery. The plaintiff proved a marriage, by the parſon and a woman, and alſo the conſummation. To encounter which, the defendant produced a ſentence of the conſiſtory court of *London* in a cauſe of jactitation of marriage brought by the woman againſt the plaintiff, wherein ſhe was declared free

Sentence in a cauſe of marriage concluſive evidence. Ann. 11. 18, 145. S. C.

 from

from all contract, and perpetual ſilence impoſed upon the plaintiff. Which ſentence was pronounced ſince iſſue joined in this cauſe. And the Chief Juſtice ruled this to be concluſive evidence, till reverſed by appeal. And the plaintiff was called. And a few days afterwards at *Guildhall*, in another cauſe, between

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Dacoſta *and* Villa Real.

WHICH was an action upon a contract of marriage *per verba de futuro*, brought by the gentleman againſt the lady, who pleaded *non aſſumpſit*. When the plaintiff had opened his caſe, the defendant offered in evidence a ſentence of the ſpiritual court in a cauſe of contract, where the Judge had pronounced againſt the ſuit for a ſolemnization in the face of the church, and declared Mrs. *Villa Real* free from all contract. And the Chief Juſtice held this to be proper and concluſive evidence on *non aſſumpſit*; that it was a cauſe within their juriſdiction, though the contract was *per verba de futuro*, and though the ſuit there is *diverſo intuitu*, being for a ſpecifick performance, as far as admonition will go, and this for damages. Yet Contract or No contract is the point in iſſue in both. And the plaintiff was nonſuit.

M. 11 Geo. 2. in C. B. Prudam v. Philips, *the Chief Juſtice held ſuch a ſentence concluſive, and would not receive evidence of fraud or colluſion in obtaining it.* Vide a note of this caſe Amb. 763. Harg. Tracts 456.

The caſes cited were, *Salk.* 437. 290. 6 *Mod.* 155. *Carth.* 225. 7 *Ed.* 2. 223. 2 *Lev.* 15. 4 *Co. Bunton's* caſe; and *Burroughs* v. *Jemino in Canc* (*ante* 733.) and *Hatfield* v. *Hatfield* in the Houſe of Lords in 1725, where on an appeal from *Ireland* the caſe was, that a woman brought a bill againſt her ſuppoſed huſband's ſon by a former wife: he inſiſted ſhe never was married to his father, but to one *Porter*, whoſe marriage with her was proved, and a releaſe from him. She upon this ſued *Porter* in the ſpiritual court in a jactitation cauſe, and obtained ſentence againſt him, and then made that her caſe in Chancery, where it was held to be concluſive evidence. And the opinion was affirmed here upon appeal (1).

(1) In addition to theſe caſes *vide Rex* v. *Vincent*, *ante* 481. *Dutcheſs of Kingſton's* caſe, *Amb.* 756. and the caſes there cited *Brownſword* v. *Edwards*, 2 *Vez.* 243. But to be concluſive, the matter of it muſt be determined *ex directo*, *Robin's* caſe, in *C. B.* 1760. *Bull. L. N. P.* 244. *et ſeq. Robins* v. *Crutchley*, 2 *Wilſ.* 122. 127. *Croſs* v. *Saltern*, 3 *Term Rep.* 639. *Hilliard's* caſe, *Caſ. temp. Hard.* 312.

Morſe *verſ.* Roach et al'. In Canc.

BEFORE the year 1718 the method was to deliver out a will of land to be proved at trials, or on commiſſions, upon ſecurity. Since that, the regiſters have refuſed to deliver out the will, but inſiſt upon being paid for attending with it; and where it was wanted at a diſtance, their demands run very high. In this cauſe an order was made (upon producing three precedents) that it ſhould be delivered out on ſecurity; it being a bill brought by creditors and legatees, who were not likely to ſuppreſs it (1).

Spiritual court obliged to deliver out will of land on ſecurity.

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(1) *Frederick* v. *Aynſcombe*, 1 *Atk.* 627. S. P.

Forſter *verſ.* Graham. [962]

ERROR of a judgment in *B. R.* in *Ireland* in an ejectment there brought on the demiſe of *Arthur* Earl of *Angleſey* for lands in the county of *Meath*, and upon Not guilty pleaded a trial at bar is had, and the jury find this ſpecial verdict.

Conſtruction upon a power to make leaſes. 2 Barn. B. R. 341. 428. S. C.

That 13 *May* 1701, *James* late Earl of *Angleſey* was ſeiſed in fee of the premiſſes in queſtion, and being ſo ſeiſed, he on 14 *May* 1701, made his will in writing, whereby he deviſed all his lands in *Ireland* to *John* Lord *Haverſham*, *Arthur Anneſley* his brother, and Mr. *J. Coote*, and their heirs, in truſt for payment of his debts, and after payment thereof, then in truſt for *Arthur Anneſley* for life, and after his deceaſe in truſt for and to the uſe of his firſt and every other ſon in tail male, and for want of ſuch iſſue then in truſt for *Richard* Lord *Altham* his uncle for life, remainder to his firſt and every other ſon in tail male; and for want of ſuch iſſue then in truſt for and to the uſe of *Charles Anneſley* his uncle for life, remainder to his firſt and other ſons in tail male; remainder to his own right heirs. Then he appoints the truſtees, towards raiſing money to pay debts, to let the premiſſes for thirty-one years in poſſeſſion and reverſion, reſerving the beſt yearly rent; and that after payment of his debts, whoever ſhould become ſeiſed of the premiſſes by virtue of his will, might make a thirty-one years leaſe, reſerving the beſt yearly rent. Then they find, that *Richard* Lord *Altham* died in the life-time of the deviſor, who 23 *November* 1701, made a codicil, wherein he recites his will, and a deſign to alter ſome part thereof, and that the codicil ſhall be taken as part of his will; and declares he does not intend to alter his will, except in

the particulars expreſſed, but the ſame ſhould remain in all other reſpects. Then he deviſes his lands in *England* and *Wales* to the former truſtees, for payment of debts, and afterwards to the uſe of *Arthur Anneſley* for life, remainder to his firſt and other ſons in tail male, the remainder to go to ſuch perſons, *and with ſuch powers, as by my will are deviſed.* And as to his lands in the county of *Meath*, he deviſes to them to *Arthur* Lord *Altham* for life, and after his deceaſe to his firſt and other ſons in tail male, remainder to the daughters of Lord *Altham*, and for want of any iſſue, to his brother *Anneſley* for life, remainder to his firſt and other ſons in tail male, and for want of ſuch iſſue, *the remainder to go to the ſame perſons, and with and under the ſame powers, as my ſaid other eſtate deviſed to him as aforeſaid is appointed to go.* He further appoints, that Lord *Altham* ſhould enjoy free from his Counteſs's jointure; and if affected thereby, he appoints other eſtates to be a ſatisfaction. And then having re-
[963] publiſhed his will, he died 18 *January* 1701. That upon his death *Arthur* Lord *Altham*, the ſon of *Richard* in the will named, entered and was ſeiſed, *prout lex poſtulat*, and being ſo ſeiſed, 27 *Auguſt* 1708, by indenture demiſed the premiſſes to *Andrew Caldwell* for thirty-one years at 60 *l. per annum*, which was the beſt yearly rent that could be got; that *Caldwell* entered and was poſſeſſed, and 1 *December* 1727, *Arthur* Lord *Altham* died without iſſue, and that the leſſor of the plaintiff is the perſon called *Arthur Anneſley* in the will and codicil, and that he entered and made the leaſe to the plaintiff, who entered and was poſſeſſed, till ejected by the defendant. But whether by the will and codicil *Arthur* Lord *Altham* had power to make the leaſe for thirty-one years, to continue in force after his death, is the doubt of the jury, on which they pray the advice of the court. And if he had ſuch power, they find for the defendant; if not, for the plaintiff.

After ſeveral arguments in *Ireland* the court was of opinion, that Lord *Altham* had power to make the leaſe to continue after his death, and conſequently gave judgment for the defendant, And error being brought in *B. R.* in *England*, the general errors are aſſigned, and in *nullo eſt erratum* pleaded.

Fazakerley pro quer' in errore argued, that Lord *Altham* being a bare tenant for life, could make no ſuch leaſe, without expreſs words giving him ſuch a power. And that the court was not to conſider the reaſonableneſs of the power, but whether in fact it is given to him. However this might be upon the will, where the power is generally given to all who ſhall become ſeiſed; yet this muſt be conſidered upon the codicil, in which he makes an end of the proviſion he intended for Lord *Altham* and his iſſue

male and female, and goes on to limit the eftate to other branches, before he makes any mention of the power. And when he takes notice of it, it is by adding it to the laft remainder.

As it ftood upon the will, he made his brother the firft taker, and therefore might think proper to give him the power; but he might not care to intruft it with Lord *Altham*, when by the codicil he puts his own brother behind him: and the changing his place, by making him the firft taker, was a fufficient benefit, without addition of the power.

That thefe powers are to be conftrued ftrictly, being clogs upon the remainder-men, and finally upon the right heirs of the devifor. He therefore contended that the leafe fell with Lord *Altham*, who died in *December* 1727, by which the eftate came clear to the leffor of the plaintiff, and that the judgment againft [964] him was erroneous, and ought to be reverfed.

Strange contra argued, that the judgment in *Ireland* is right and ought to be affirmed:

The queftion upon which this is to turn, is ftated in the conclufion of the fpecial verdict, and is, whether the leafe for thirty-one years made by *Arthur* Lord *Altham*, referving the beft improved rent that could be got, has in law any continuance after his death.

And this depends upon the conftruction of the will and codicil together, by which I fhall infift, firft, that it appears to be the intent of the devifor, to give him a power to make fuch leafe. And fecondly, that he has ufed words proper for that purpofe.

On the one hand I admit, that barely as tenant for life he could have no fuch power, but we muft look for it in the will or codicil. And on the other hand it muft be admitted to me, that they both make but one will, and fo the devifor has declared.

By the will (which takes in all the *Irifh* eftate) the devifor limits the premiffes, after payment of debts, to his brother *Arthur* for life, remainder to his fons in tail male, remainder to *Richard* Lord *Altham* (the father of him who made the leafe) for life, with remainder to his iffue male, and for want of fuch iffue to his uncle *Charles Annefley* for life, and after his deceafe to his fons in tail male, remainder to the right heirs of the devifor. And

And then come the words of the power, that whoever ſhould become ſeiſed of the premiſſes, might make a thirty-one years leaſe, reſerving the beſt improved rent.

As it ſtands therefore upon the will, it is plain he intended to exclude no one who ſhould be ſeiſed from this power of making leaſes, but gives it as well to the tenants for life as their iſſue in tail. And it is not a power perſonal to the deviſees named, but a power that is to run with the land, in whoſe hands ſoever it ſhould come. Thus it ſtands upon the will.

Conſider what alteration is made by the codicil. By that it is plain he intended a benefit to Lord *Altham*, and not to abridge his power. For whereas by the will he could take only in remainder after the life eſtate of the preſent earl, and the extinction of an eſtate in tail male in his iſſue: he *now* makes him the firſt taker of this part of the *Iriſh* eſtate, and deviſes the [965] ſame to him in poſſeſſion. He exonerates this eſtate from the payment of debts, to which it was ſubject by the will: and appoints ſatisfaction to be made out of his other eſtate, if his lady's jointure ſhould affect this. He likewiſe gives this eſtate to the iſſue female of Lord *Altham*, which is more than he did even for his own brother, or any body elſe. From all which it is natural to imagine, he did not intend to extinguiſh this power as to the firſt deviſees and their iſſue, and leave it only in *Charles Anneſley* his uncle, who can claim only under a remote remainder.

And to ſupport ſuch a conſtruction, one would be led to expect an expreſs extinguiſhment of the power. But of this there is no pretence. All that is contended for is, that he has omitted it in the firſt part of the clauſe, which deviſes it to Lord *Altham* and his iſſue and to the preſent earl and his iſſue male; and has introduced it only at laſt, where he refers for the ſubſequent remainders to what is contained in his will, which perſons are to take the eſtate with and under the powers in the will. But as this is very unnatural and abſurd, ſo it is directly contrary to the words, and the legal and natural conſtruction of them. He introduces the codicil, with declaring that his will ſhall ſtand in all particulars, not altered by the codicil. He ratifies and confirms the unaltered parts, and republiſhes his will, ſubject only to the alterations. So that as he only tranſpoſes the place of Lord *Altham*, and makes him to take in poſſeſſion inſtead of remainder, I apprehend the power would have ſubſiſted in him, if there had been no notice taken of it in the codicil. For otherwiſe his will does not ſtand as to all the particulars unaltered by the codicil. But ſo far is he from deſigning to take away the power,

power, that he takes notice of it in every part of the codicil, and even extends it to lands that were not comprized in his will, which are the lands in *England* and *Wales*. Thofe he limits to the prefent earl and his iffue, '*and for want thereof, the remain-' der to go to fuch perfons, and with fuch powers, as are mentioned' in his will.*' He adds the fame words to the devife of the *Kildare* eftate, and likewife to the devife of the premiffes in queftion.

The plain meaning of the words, is this,

'Whereas by the will I have appoined *A.* to take before *B.* ' I now appoint *B.* to take before *A.* with remainder to *C.* as ' before, and under the fame power.' Which words *with and under the fame power*, muft in conftruction extend to the whole, according to feveral authorities. 1 *Sid.* 312. *Ferrers* v. *Newton*, it is there laid down as a general rule, ' that words in the ' beginning or end of the fentence run through the whole and ' govern all, but the words in the middle refer *ad media tan-' tum*:' as if a leafe for life be made to *A.* remainder to *B.* for life, rendring rent, the refervation extends to both; but if it had been to *A.* for life rendring rent, remainder to *B.* the refervation would not have extended to the laft. The fame rule is likewife laid down in 1 *Sid.* 328. 1 *Saund.* 58. and *Hob.* 276. So in 10 *Co.* 106. *Humphrey Lofield's* cafe, *A.* demifed to *B.* a cellar for one year, and if at the end of the year both parties fhould be willing to continue it for any longer time, then *B.* was to hold over for the term of three years then next following, rendring to *A.* 40*s.* yearly during the term. It was objected in an action for the firft year's rent, that the refervation was only for the contingent intereft of three years, and neither party had fuffered that to arife; and it was only during the faid term in the fingular number, which could refer only to the laft antecedent, which was the term of three years. But the court held, that the refervation went to the whole, and the proper place of it was after the limitation of all the eftates. And therefore if a man lets lands to *A.* for life, remainder to *B.* and the heirs of his body, and for default of fuch iffue remainder to *D.* in tail, or for life, rendring rent, this refervation fhall extend to all the eftates before. [966]

In the cafe at bar the words are ufed at the clofe of the fentence to this effect, ' I give my eftate in *Meath* to Lord *Altham* for life, remainder to his firft and other fons, remainder to *B.* in tail, remainder to *C.* with a power to make leafes for thirty-one years.' Which laft words, according to the authorities cited, will extend the power to every one of the eftates.

It

It is obfervable, that in the devife of the *Meath* eftate, he has ufed a word with regard to the power, that he has not ufed as to the *Englifh* or *Kildare* eftate, and that is the word *under*: He gives *thofe* eftates to the remainder-man *with* the power of making leafes; but *this* is given to the remainder-man *with* and *under* fuch a power. The conftruction of which is, that he fhall have the eftate *with* the power to exercife it himfelf, and *under* and *fubject* to the exercife of it by thofe who went before.

I can by no means admit this to be a power that prejudices the remainder-man; I rather take it to be for his benefit, there being no room to take a fine, but a direction to referve the beft improved rent; and tenants for a certain term of years are more likely to keep the eftate in heart, than where their intereft depends on another's life.

What therefore we muft infift upon is, that the power is well raifed by the will, and muft fubfift, if not extinguifhed by the [967] codicil; that the codicil is fo far from extinguifhing, that it takes notice of, and confirms it: and that it is abfurd, and contrary to the plain intention of the devifor, to fay, that Lord *Altham*, his own brother, the leffor of the plaintiff, and their iffue (for whom he has fhewn the greateft regard by placing them firft in his will) fhall have no power, and that it fubfifts only for the benefit of *Charles Annefley* the moft remote remainder man in the will.

Et per curiam, We muft take the will and codicil together, and upon both it is plain he only intended to alter the order of taking, and to exonerate this eftate from the debts, to which it was fubjected by the will. There is no neceffity to confine this power to the laft remainder man, efpecially as the word *under* is ufed with regard to thefe lands and no other.

An *ulterius concilium* was granted. But no body appearing on the part of the plaintiff in error, to argue it: the judgment was afterwards affirmed without further debate.

Easter Term

7 Georgii 2. Regis. In B. R.

Philip *Lord* Hardwicke, *Lord Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq*;

John Willes, *Esq*; *Attorney General.*

Dudley Ryder, *Esq*; *Solicitor General.*

Dominus Rex *vers.* Gibson.

THE defendant was convicted of forgery, and would have moved for a new trial, without appearing in court; insisting that this differed from a motion in arrest of judgment. But the court held there was no difference; for the verdict fixes such a presumption of guilt, that the court will be sure of him, before they intimate any opinion: and even when the verdict was brought in would have committed him, had he staid in court. And the Chief Justice mentioned the cases of *Regina* v. *Ridpath*, *Pasch.* 12 *Ann.* and *Rex* v. *Lunt et Wombwell* in perjury, where the distinction now taken was over-ruled.

Defendant after conviction must be in court to move for a new trial.
1 Sess. Ca. p. 428. No. 335.
2 Barn. B. R. 412. 418.
Cunn. 29. S. C.
Ante 844.

Day & al' *vers.* Searle.

THE mariners libelled on a contract under seal, and a prohibition was granted, on the authority of *Salk.* 31 (1). *Vide* 3 *Lev.* 60. *contra.*

Where the contract is under seal, mariners cannot sue in admiralty.
2 Barn. B. R. 419.
Cunn. 32. S. C.

(1) *Howe* v. *Napier*, 4 *Burr.* *Parre*, 2 *Ld. Raym.* 1209. and 1944. S. P. *Et vide Bens* v. *Menetone* v. *Gibbons*, 3 *Term Rep.* 267.

267. in which case the court held that the admiralty had cognizance of an hypothecation bond given in the course of a voyage, though it was under seal, and executed upon land, *the subject matter being exclusively within the admiralty jurisdiction.*

[969]

Comber *vers.* Hill.

Of cross remainders by implication.
Cas. temp. Hardw. 22.
2 Barn. B. R. 367. 443.
2 Kely. 188.
MSS. S. C.

UPON Not guilty in ejectment for the moiety of a house with the appurtenances in *Sussex*, on the demise of *John Jarvis* and *Anne* his wife, the jury find this special verdict.

That *Richard Holden* being seised in fee of the whole premisses, 11 *March* 1698, duly made his will in writing, whereby he devises the whole premisses to his son *Richard* (after the death of his wife) for life, remainder to his first and every other son and sons in tail male, and for default of such issue to *his grandson* Richard Holden *the son of* Thomas Holden *and to* Elizabeth Holden *his grandaughter, equally to be divided, and to the heirs of their respective bodies, and for default of such issue to his grandaughter* Anne Holden *in fee*. That 25 *March* 1699, the devisor died seised; that the devisor's wife, *Richard* his son, and *Anne* his wife, and *Elizabeth Holden* the grandaughter, are dead. That *Richard* the son left no issue male, and *Elizabeth* the grandaughter died without issue. That *Richard Holden* the grandson is living. And that 1 *March* 1723, *Anne* the grandaughter married *John Jarvis* (the lessor) who claiming a moiety in right of his wife, on the death of *Elizabeth*, entred and made the lease to the plaintiff who entred and was possessed, until ejected by the defendant. *Sed utrum, &c. Et si pro quer', pro quer.' Et si pro def', pro def'.*

This cause was twice argued at the bar upon the question, whether any cross remainders were created by this will, and this term the Chief Justice delivered the resolution of the court.

The general question in this case is, in whom the moiety devised to *Elizabeth* the grandaughter vested on her death without issue. Whether in *Richard* the grandson, the other devisee in tail, or in *Anne* the grandaughter under her remainder in fee. Or in other words, whether any cross remainders are created by this will. If there are, it will be with the defendant; if not with the plaintiff. And we are all of opinion, that no cross remainders can arise upon this will; but the moiety of *Elizabeth* goes over to her sister *Anne*.

To make cross remainders in any case, there should be either express words, or a strong necessary implication. For the first

of these, I do not find it was insisted on at the bar, that there are any express words; all they contended for on the part of the defendant was, to bring it under the other head of a necessary implication. This necessary implication must arise from words that denote the plain intent of the devisor, and that cannot be satisfied without such a construction; for if it stands indifferent, we cannot raise cross remainders by conjecture (1). [970]

The doubt here arises on the words, '*and for default of such* '*issue*' (2), which being relative, we must see what goes before: those words are, '*to my two grandchildren* Richard *and* Elizabeth '*equally to be divided, and to the heirs of their respective bodies.*' (3); now the word *respective* is what *such* may very naturally refer to: and then it runs, I give one half to my grandson, and the other to my grandaughter, and for default of issue respectively I give *the same* to *Anne*, *i. e.* the same respective part that the person dying was seised of: otherwise the word *respective* must be rejected: where as it stands in this will, it will have the same operation, as if the devises had been by separate clauses.

(1) *Vide Perry* v. *White*, *Cowp.* 777.

(2) Anciently the law was, that cross remainders could not be raised in a will between more than two, without express words. *Gilbert* v. *Witty*, 2 *Cro.* 655. But the rule is now established, that, wherever cross remainders are to be raised between two the presumption is in favour of them; where they are to be raised between more than two, it is against them. But that presumption may be answered by circumstances of plain and manifest intention either way. This intent therefore must be collected from an examination of the particular circumstances of each particular will. These words "*in default of such issue*," have been held to raise cross remainders in *Phipard* v *Mansfield*, *Cowp.* 797. *Atherton* v. *Pye*, 4 *Term Rep.* 7[illegible]. *Wright* v. [illegible]*lsford*, *Cowp.* [illegible] *Rep.* by the name of *Wright* v. *Englefield*, *Ambl.* 408. and of *Wright* v. *Lord Cadogan*, 6 *Bro. P. C.* 156. *Holmes* v. *Wale*, 1 *Freem.* 483. and *Dyer* 30[illegible] *pl.* [illegible] Two cases [illegible] *Miller* v. *Moore*, 17[illegible] and *Doe ex dem Burden* v. *Burville*, have also been cited as settling the rule respecting cross remainders. *Cowp.* 3[illegible] 7[illegible] 1. *Doug.* 53. *n.* but I have not been able to procure a note of them. See also *Doe* v. *Wainwright*, 5 *Term Rep.* 427. Cross remainders cannot be raised by implication in a deed. *Doe ex dem. Tanner* v. *Dorvell*, 5 *Term Rep.* 518.

But it is otherwise in executory articles. *Twisden* v. *Lock. Amb.* 663.

(3) The words "*several* or *respective*," as they did in the title, prevent the implication of cross remainders unless the intention to raise them is otherwise very strongly manifested. *Vide Williams* v. *Brown*, *post.* 996. *Davenport* v. *Oldys*, 1 *Atk.* 579. and the ground of that opinion as reported by Lord *Mansfield*, in *Phipard* v *Mansfield* *Cowp.* 799. See also *Marryat* v. *Townly*, 1 *Vez* 102.

In *Leach* v. *Jackson et al'* coram *Lord Apsley*, *Trin Term* 11 *Geo.* 3. *in Chancery*, *R. Hawes devised to his six nieces to be equally divided between them share and share alike as tenants in common*, &c. *and of the several and respective heirs of the body and bodies of all such and every my said six nieces, and in case one or more of my said six nieces shall happen to die without issue of her or their bodies, then I give*, &c. *the share or shares of her or them so dying without issue to the survivor or survivors of them my said six nieces share and share alike as tenants in common*, &c. *and to the several and respective heirs of the body and bodies of such survivor or survivors of them, and if all my said six nieces shall die without issue, then I give*, &c. *all the same manors*, &c. *unto my own right heirs for ever. Three of the nieces died without issue. It was admitted that the original share went to the survivors by way of cross remainders, but it was insisted that the shares which the two last dying nieces took by way of accruer did not survive.* MSS.

Articles upon a marriage to lay out the wife's fortune in lands To the use of all the children of the marriage as tenants in common and of their respective heirs, and for default of such children and their issue to the use of the survivor of the husband and wife. Lord Camden held there were cross remainders.- *Twisden* v. *Birt*, *after Hil. Term* 176[illegible], *in Chanc.* MSS. Vide S C Rep. Amb. 663. by the name of Twisden v. Lock.

The devisor was thinking it improper to divide this house between three; therefore he takes care, that but two grandchildren shall take together; so that letting in *Anne* on the death of either, makes no more splitting than he allowed at first. This is a circumstance arising on the face of the will, where he calls them all grandchildren: and these arguments from the relation the devisees stood under to the devisor have always been thought of weight.

This case materially differs from the case of *Holmes* v. *Meynel* relied on by the defendant. That case is reported in *Poll.* 425. Sir *T. Jones* 172. *Raym.* 452. and *Skin.* 17. and was thus. *A.* devised to his two daughters and their heirs, equally to be divided between them; and in case they happen to die without issue, then I give *all* the said lands to my nephew. And it was held, that the nephew could not take until both sisters were dead without issue, and that there should be cross remainders. This case must be taken for law; but unless cross remainders were raised, the intent must fail, and material words be rejected. For, first, it was not his intent to provide for his nephew, while there was any issue of either of his daughters: he was not so near to him, and it would be an unnatural construction, to carry the estate from his own issue to him, which was much relied upon. Secondly, it is if they die without issue, *i. e.* if *both* die: and that is *Raymond*'s construction of the word *they*, to which the rest agreed. Thirdly, it is *all* the said lands, which shews he intended all should go together: and it was absurd to imagine that the death of one daughter should carry the estate from the other, even her own moiety; which must have been the case, if the nephew took upon the death of either.

[971] So in the case cited from 4 *Leon.* 14. of a devise to two sons in tail; and if any of my sons die without issue, then the whole land shall go to a stranger in fee. There was the unnaturalness of giving the estate from his own children, and the word *whole* could not be used without raising cross remainders. Upon the whole the plaintiff must have judgment.

Kent *vers.* Kent.

Where there are two tenants to the writ in dower and one dies after judgment for damages, and his heir and the other bring error, the whole of the original damages should be recovered against the survivor. But the value from the time of the judgment to the affirmance cannot be recovered against the surviving plaintiff in error only. And the court cannot compute such value after the rate of the damages found by the first jury, but should award a writ of enquiry. But although such judgment is for the benefit of the heir of the deceased tenant, yet he may join in the writ and assign it for error. Cas. temp. Hardw. 50. 2 Barn. B. R. 357, 386, 441. 2 Kelyn. 194. cited And. 154. S. C.

THIS was a writ of error from *Ireland* upon a special verdict in dower, arising upon the construction of an *Irish* act of Parliament of no consequence to be understood here: but

besides

besides the argument upon the merits, there were several exceptions taken to the record, all of which (except one) were overruled. And as to that which was allowed, it may be shortly stated by way of case.

There were two tenants to the writ of dower, *Edward May* and *Robert Kent*: the demandant has judgment to recover her dower and 158 *l.* for damages and costs. They both bring error, and assign errors, and then *Edward May* dies, and there is judgment to abate the writ of error. After which *Kent* and *Robert May* the heir of *Edward* bring a new writ of error; and the judgment is affirmed *in toto*; and a writ of seisin awarded for the dower against both, and execution for the damages and costs against *Kent* only, and also for the value from the time of the judgment according to the former computation.

To this exception was taken, that *Kent* alone ought not to be charged; for the statute subjects, not only the tenant in the action, but also those who join in the writ of error, as being bound by the judgment.

And after consideration the Chief Justice delivered the opinion of the court upon this point.

We are all of opinion that as to damages from the time of the judgment in *C. B.* to the affirmance in *B. R.* in *Ireland*, the judgment is erroneous, and ought to be reversed.

We have no doubt but that the King's Bench might award damages from the time of the judgment to the affirmance. But the objections are to the manner of doing it, and they are two. 1. That they have computed it according to the value found by the first jury, whereas there ought to have been a writ of inquiry. And, 2. Because they have awarded them against *Kent* only.

As to the first: This power of awarding damages on the writ of error is not founded on the statute of *Merton*, for that does not enable the courts to go farther than the effectual judgment to recover seisin in the court where the writ is brought. This gave occasion to make the statute 16 & 17 *Car.* 2. *c.* 8. which is enacted in *Ireland* the next year; and thereby power is given to the court to which the cause is removed by writ of error, to award an inquiry of the value of the *mesne* profits after the first judgment in dower, and upon return thereof to award an execution. [972]

It may be said that the annual value is ascertained by the first jury, therefore it is a mere matter of computation, which the

court may make without a writ of inquiry. To this I answer, that the statute is introductive of a new law, and therefore the method therein prescribed must be observed: besides, as the time for which they are given is different, the value might be so too; and that was the reason why the former computation was not allowed to be the rule. The statute of *Merton* does not require a writ of inquiry, as this of *Car.* 2. does: and therefore the jury who try any collateral issue, inquire of the value at the same time upon the statute of *Merton*; and no inconvenience can arise, because they are assessed by a jury either way: but where the value is omitted to be inquired of, or the judgment is upon a demurrer, there is a necessity for a writ of inquiry. *Rastal* 230. *a. Saund.* 335. *Lutw.* 719. And agreeable to this is the case of *Worden* v. *Worden*, entered in *B. R. Pasch.* 3 *W.* & *M. rot.* 393. where the value was omitted to be inquired of below, and a writ of inquiry was awarded by this court.

And as it was wrong in this case to assess the damages without an inquiry; so, 2. was it to lay the whole upon *Kent*.

As to the damages during their joint lives, they must be considered as joint trespassers, and then the heir is not chargeable, but the whole damages may be levied on the survivor. But for the time the heir was in possession, he was equally a trespasser with *Kent*, and as such equally liable to make satisfaction. Could he maintain this writ of error without entering into a recognizance? Certainly he could not. And has not he thereby subjected himself as much as the other has done?

But then taking it to be wrong in both particulars, an objection is made, that this being for the benefit of the heir he
[973] cannot assign this for error, though *Kent* may. And to be sure the general rule is, that a man shall not assign matter for his own
Ante 892. advantage, but he ought to be severed from the defendant who is hurt. *Cro. Eliz.* 891, 1 *Saund.* 239. *Yelv.* 3. *Cro. Jac.* 92. But we think that was not necessary here, it being the fault of the court, and differs from the case of too long an essoin which is prayed by the party. 8 *Co. Beecher's* case. 2 *Saund.* 49. 1 *Roll. Abr.* 759. *T.* 2.

Ante 189, 808, 934 (1). This part of the judgment therefore being wrong, and the error well assigned, it must be reversed as to this part only, and

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(1) *Green* v. *Waller*, 2 *Lord Raym.* 891. See also *Knox* v. *Costello*, 3 *Burr.* 1791. *Heath* v. *Chilton*, 4 *Burr.* 2015. *Hancock* v. *Haywood*, 3 *Term Rep.* 435.

the other being a diftinct judgment may be affirmed. *Salk.* 24. To this we think proper to add, that we are alfo to do what the court below fhould have done; which is to direct them to award a writ of inquiry, for we cannot do it ourfelves, as we fhould have done in an *Englifh* caufe, fince it muft go to a fheriff out of our power. But we remit the record with an affirmance of one part, and reverfal of the other, with a command to *B. R.* in *Ireland*, to award a writ of inquiry, and upon return thereof to do what by law appertains thereto.

Cro. Jac. 206, 534. Carth. 180. Cro. Car. 511.

Cary *verf.* Hinton.

Informal iffue cured by a verdict. 2 Kely. 153. 2 Barn. 363, 436, 449. S. C. Vide 5 Com. Dig. Pleader. (R. 18.) 511. (S. 47.) 537.

TRESPASS for breaking and entering his clofe, and treading down the grafs. The defendant pleads, that the *locus in quo* was his proper lands. To which the plaintiff replies, that it was the eftate of inheritance and the proper lands of the plaintiff, and not the proper lands of the defendant; upon which iffue is joined, and a verdict for the plaintiff.

Ketelbey moved in arreft of judgment, that this was an immaterial iffue, for this is a poffeffory action; and the plaintiff may have the inheritance in him, and yet not be in poffeffion.

Strange contra infifted, that it was but an informal iffue, and had the pleadings been in *Latin* it would have been the common plea of *liberum tenementum*, as it was intended to be by this tranflation. The queftion between the parties is, to whom this clofe belongs, and the jury have found it belongs to the plaintiff. And though I admit this replication and plea would both have been ill on demurrer; yet after a verdict it is well enough; and he cited 2 *Bulft.* 41. 5 *Co.* 43. *Salk.* 365. *Yelv.* 227. and *Trin.* 1 *Geo.* 1. *B. R. Yeatman* v. *Mufton*, where in trefpafs the defendant pleads, that *A. feifitus fuit* and demifed to him, and then prefcribes in a *que eftate* for a way; and found for the defendant, and held well after verdict: though it was objected, that he might only have an eftate for life under *feifitus*, to which no prefcription can be annexed. [974]

Et per curiam, It being found to be the plaintiff's eftate of inheritance, we muft take it he had the fee, which is the whole intereft, and that the defendant had no intereft at all. We are not to prefume a poffeffion diftinct from the fee; and here is enough for us to fee where the right of the caufe is, and to warrant our judgment for the plaintiff.

Devenish *verf.* Mertins.

Double cofts ordered by rule. 2 Barn. B. R. 373, 432, 449. B. L. N. P. 332. 2 Kely. 18. S. C.

Ante 46. *Brampton* v. *Crabb.*

TRESPASS for taking a gun. And after Not guilty pleaded, the plaintiff moved to difcontinue upon payment of cofts. The defendant, upon affidavit of his being a juftice of peace and in the execution of his office, moved for double cofts. And the queftion was, whether it fhould be done by rule or by fuggeftion. And upon confideration the court held, that this being a difcontinuance with leave of the court obtained by rule, they might make this a part of the terms. And that differed it from the cafe of a verdict or nonfuit, where it muft be done by way of fuggeftion (1).

(1) *Anon.* 2 *Barnard B. R.* 171. But after verdict the judge who tried the caufe muft certify, and it can not be done by fuggeftion. *Anon.* 2 *Vent.* 45. *Grindley* v. *Holloway, Doug.* 294.

Dominus Rex *verf.* Heflop.

There muft be a *quorum* in an order of baftardy by borough juftices (1). 1 Sefs. Ca. p. 250. no. 199. 2 Barn. B. R. 413, 421. Foley. 412. Cun. 31. S. C.

AN order of baftardy made by two juftices of the borough of *Richmond* in *Yorkfhire* was quafhed for want of *quorum unus*: though 3 *Car.* 1. *c.* 5. was infifted on, where juftices in precincts have power to execute the 18 *Eliz. c.* 3. as juftices in the county do; which, *per curiam*, muft be in the fame manner, *Quære tamen*, for many charters have no *quorum*.

(1) But by 26 *Geo.* 2. *c.* 27. no order fhall be quafhed for this exception.

Wainwright *verf.* Bagfhaw.

Where church-wardens have accounted they cannot be cited again. 2 Barn. 421. Cunn. 33. Andr. 11. in N. S. C.

THE church-wardens were cited into the court of *Litchfield* to account: they pleaded, that they had accounted at the veftry according to law; which was rejected: and a prohibition granted, for the ordinary is not to take the account; he can only give a judgment *quod computent*, and to what purpofe fhould they be fent back to thofe who have taken their account already. The fame rule was made *in Scaccario, Pafch.* 2 *Geo.* 2. between *Haughton et al'* church-wardens of *St. Alban Woodftreet* and *Kendrick et al'*; and in the cafe of the church-wardens of *Hammerfmith*,

Hammerfmith, *Mich.* 1 *Geo.* 2. * *Nutkin* v. *Robinfon*: and *vide Lutw.* 1028. and *Prideaux to church-wardens*, 103 (1).

* See Bunb. 247. pl. 318. S. C. S. P. but not S. T. note to a ed.

(1) *Adams* v. *Rufh*, *poft.* 1133. *Snowden* v. *Herring*, *Bunb.* 289. *S. P.*

Dobbs *verf.* Paffer.

[975]

Regular judgment in ejectment fet afide upon payment of cofts, and taking fhort notice of trial. 2 Barn. B. R. 431. S. C.

THE plaintiff figned judgment in ejectment, and before he had loft any trial the defendant applied to fet it afide, though ftrictly regular, upon payment of cofts, and taking notice of trial; which the plaintiff refufed. And the court being appled to, a diftinction was offered between ejectments and all other actions, becaufe the right was not bound, but a new ejectment might be brought. *Sed per curiam*, That diftinction held formerly in many inftances where it is now exploded, you could not formerly have a new trial as you now may; and great inconveniencies may arife from changing the poffeffion, timber may be felled, *&c.* and as the Common Pleas makes no difference, and we are got into their way in all other actions, it is proper to do it here too (1).

(1) *Vide Doe ex dem. Troughton* v. *Roe*, 4 *Burr.* 1996.

Gammage *verf.* Watkin.

Where the debt does not require bail, cofts will not warrant holding to bail in debt on the judgment.

THE debt was three guineas, but the cofts fwelled it to 14*l.* 10*s.* for which the plaintiff had judgment, and the defendant brought a writ of error. The plaintiff brought debt upon the judgment, and held the defendant to bail: and now upon motion the proceedings were ordered to ftay pending the writ of error, and common bail to be accepted; for as the original demand did not require bail the addition of cofts will not alter the cafe (1).

(1) *Palmer* v. *Needham*, 3 *Burr.* 1389. *Robinfon* v. *Nicholls*, *poft.* 1077. *Belither* v. *Gibbs*, 4 *Burr.* 2117. *Creffy* v. *Kell*, 1 *Wilf.* 120. *Bufh* v. *Bates*, 5 *Burr.* 2660. *Anon. Cowp.* 128. *acc.* But in *Lewis* v. *Pottle*, 4 *Term Rep.* 570. Refolved *contra* after conference with *C. B.*

Dominus Rex *verſ.* Juſtices of Shrewſbury.

Poor's rate not to be removed. 1 Seſs. Ca. p. 253. no. 201. Cunn. 28. 2 Barn. B. R. 271, 440, 457. S. C. Ante 932.

UPON appeal to the ſeſſions the poor's rate was quaſhed, and the ſeſſions make a new one. To remove which I moved for a *certiorari*, becauſe here we could have no appeal, which was one reaſon given in the caſe of *Uttoxeter*. But the court ſaid, that was not the only reaſon they went upon, and denied a *certiorari*.

Burleigh *verſ.* Harris.

No writ of error *coram vobis* lies after affirmance. 2 Barn. B. R. 422, 430, 431. Cunn. 34. S. C. Ante 949.

A Judgment was recovered in the *Marſhalſea*, and error brought in *B. R.* and error in law aſſigned, and the judgment affirmed: then a writ of error *coram vobis* was brought, and error in fact aſſigned; and the court ſtaid proceedings upon it, and gave leave to take out execution. For as error in fact and law cannot be both aſſigned on one writ, there is no reaſon to do [976] it by a more dilatory method: and it is like the caſe of *Lambell* v. *Prettyjohn* (*ante* 690.) where it was held that error *coram vobis* would not lie after affirmance in the Exchequer Chamber: beſides it would be very odd, that the ſame court ſhould affirm and reverſe. And as to the caſe in *Salk.* 337. where it is reported to lie after affirmance; that is not warranted by the record, which is entered *Hil.* 3 & 4 *Jac.* 2. *rot.* 420. by which it appears, the writ of error abated, and there was no affirmance; which is agreeable to 1 *Roll. Abr.* 753. *Q.* 1.

Dominus Rex *verſ.* Ellames.

Amendment. 2 Barn. B. R. 440, 445. Caſ. Temp. Hard. 42. more at large and Cun 39. verbatim in the ſame. And. 111. n. S. C.

INFORMATION in the nature of a *quo warranto* againſt the defendant, who claimed to be mayor of *Cheſter*. The defendant juſtified under a charter and by-law, by which the mayor is to be choſen by all the fellow citizens of the city and of the ſuburbs and hamlets inhabiting within the ſame, or a major part of them; and lays his election to be by the majority of the citizens of *Cheſter*. To this there was a demurrer and joinder in demurrer. And when it came it into the paper, the defendant's counſel perceived, that they had left out thoſe citizens who inhabited within the ſuburbs and hamlets. Whereupon they moved to amend, and ſhewed by affidavits, that the proſecutor had not loſt a trial, and offered to pay coſts, and likewiſe produced an affidavit, that it was not a voluntary miſtake.

And after long debate and many caſes cited, the court gave leave to amend, and chiefly for reaſons peculiar to this caſe.

1. Becauſe

1. Because otherwise the office would be lost, without trial of the right (1). 2. This cannot be made use of as a trick to gain time, because of the affidavit made in this case. 3. Here has been no trial lost, so that the prosecutor may still try the merits in time (2). 4. The prosecutor was not driven to demur; for if he had gone to issue, and it had been found with the defendant; yet as a defect of title appears in the plea, he would have been intitled to a judgment of *ouster* *Vide ante* 394, 873 (3).

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(1) Plea in *quo warranto* allowed to be *amended* after issue joined and cause made, a *remanet* by reason of the multiplicity of business though the defendant's office was determined, because the rights of other persons would be affected by the event of the cause. *Rex* v. *Armstrong*, *And.* 109.

(2) *Vide Rex* v. *Edwards*, *And.* 111. *n.*

(3) It is laid down by Lord *Hardwicke* in delivering this judgment as reported *Cas. Temp. Hard.* "that amendments at the common law are wholly discretionary."

Trinity Term

* 7 & 8. See Burr. Sett. Caf. 7. n. to 2 ed.

* 7 Georgii 2. In B. R.

Philip *Lord* Hardwicke, *Lord Chief Juftice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Juftices.*
William Lee, *Efq*;

John Willes, *Efq*; *Attorney General.*

Dudley Ryder, *Efq*; *Solicitor General.*

Cafwell *verf.* Norman.

Where executor fhall pay cofts. 2 Barn. B. R., 450. Cun. 38. 1 H. Black. 567. n. S. C.

AN executor brought error of a judgment after a *devaftavit*, and the court held he ought to pay cofts on affirmance (1).

(1) *Vide Saltern* v. *Wynne, poft.* 1072. *Williams et al' Executors* v. *Ryley, in Cam. Scac.* 1 *H. Black.* 566.

Smith *verf.* Hixon.

The hufband alone may fue for malicious profecution of the wife *per quod* he was put to expence. Caf. Temp. Hard. 54. 2 Barn. B. R. 465. Cun. 52. Vide 2 Com. Dig. Baron & Feme. (X.) 107.

CASE for malicioufly profecuting the plaintiff and his wife for receiving ftolen goods knowing them to be ftolen, *per quod* they were both fcandalized, and the hufband interrupted in his trade, and put to expence. On Not guilty pleaded, the jury find for the defendant as to profecuting the hufband, and for the plaintiff as to the profecution of the wife. And it was moved in

 arreft

arreſt of judgment, that what concerns the huſband being now out of the caſe, the wife ſhould have joined in the action as to the matter for which the plaintiff would recover, and the action would ſurvive to her; and they cited *Cro. El.* 884. 1 *Sid.* 5.

* *Sed per curiam*, In *Savil* v. *Roberts*, (*a*) *Salk.* 13. it was indeed held, that expence alone without ſcandal would not be a ground for ſuch an action: but afterwards in the caſe of *Jones* v. *Gwynne*, (*b*) *Hil.* 12 *Ann.* that opinion was exploded. Here it is laid that the huſband was put to expence, and this being an action founded upon a tort, the plaintiff was not bound to prove all the declaration, as he is in the caſe of contracts: and though this action as to the ſcandal may ſurvive to the wife; yet that is no reaſon, for he may undoubtedly maintain treſpaſs for beating her *per quod conſortium amiſit*, and yet no doubt the action for beating will ſurvive. The plaintiff muſt have judgment.

(*a*) Rep. alſo Salk. 16. 5 Mod. 394, 405. Carth. 416. 1 Ld. Raym. 374. 12 Mod. 208. Holt 8, 150, 193. S. C. 2 Vin. 25. pl. 42.

(*b*) Salk. 15. 10 Mod. 148 214. Gilb. 185. S. C.

1 Leon. 299. Cro. El. 147, 157, 524. 1 And. 48.

[*978]

Braſſey et al' *verſ.* Dawſon et al'.

Land-tax money in the hands of the collector is a debt due to the King.

Where therefore the collector commits an act of bankruptcy on the 7th, and his goods are ſeized under the warrant of the commiſſioners for land-tax money the 16th, and a commiſſion iſſues againſt him the 17th, the aſſignment is made the 19th and the goods are ſold under the warrant the 22d, trover for the goods will not lie by the aſſignees without payment or tender of the money due by him. But ſuch warrant binds the goods not from the date but from the time of the ſeizure.

2 Barn. B. R. 342, 382. Cun. 265. Kely. 290. S. C.

IN trover by the plaintiffs as aſſignees of the effects of *Samuel Fairclough* a bankrupt, a caſe was made for the opinion of the court.

That the bankrupt was appointed collector of the land-tax for the precinct of *Aldgate* in the city of *London* during the year 1730. That 7 *July* 1731. he committed an act of bankruptcy, having then 190 *l.* of the tax in his hands. That 16 *July*, the commiſſioners of the land-tax iſſued their warrant, upon which the goods in the declaration were ſeized the ſame day. That 17 *July* a commiſſion of bankruptcy iſſued. That an aſſignment was made to the plaintiffs on 19 *July*, and that on 22 *July* the defendants took away the goods, and ſold them.

Upon this ſtate of the caſe the general queſtion was, whether the plaintiffs had a property in theſe goods; for as to a converſion (ſuppoſing there was a property) the defendants did not offer to diſpute it. This cauſe was twice argued at the bar, and for the underſtanding it, I ſhall give my own argument for the plaintiffs, and the opinion of the court for the defendants.

Strange pro quer'. I ſhall conſider this caſe two ways, 1. As if it was between private perſons; and 2. Whether here is any intervention of the prerogative.

As to the firſt, To make theſe goods ſeizable they muſt be *his*, *i. e.* the bankrupt's, at the time of ſuch ſeizure. They power in

3 *Geo.* 2. . 25. is, "For the commissioners to seize the estate "real and personal of such collector *to him belonging*." And I shall insist, that on 16 *July* these goods were not *his*, the act of bankruptcy being stated to have been before. And that though in the case of the crown it has been held, that it is sufficient to [979] come any time before the assignment, and there is no relation to bind the crown; yet in the case of a subject the goods are in the assignee by relation from the act of bankruptcy, and all *mesne* acts will be avoided. *Salk.* 111. And therefore it is constant experience, to over-reach a compleat execution at the suit of a subject, by shewing only an act of bankruptcy before. And 21 *Jac.* 1. *c.* 19. supposes so, by providing that the goods shall be equally distributed between the creditors, whereof no execution is *served* and *executed* before an act of bankruptcy. So in *Philips* v. *Thompson*, 3 *Lev.* 69, 191. where the writ was delivered before, but not executed until after an act of bankruptcy; it was not doubted, but it would have been bad, had the act of bankruptcy been before both. Bankrupts are considered as offenders, who have forfeited their estate, and are not capable of conveying any property: and therefore where after an act of bankruptcy, and before any commission, the bankrupt sells goods; it is in the election of the assignee, to disavow it and bring trover: he may indeed avow it, and sue for the money; but then the bankrupt is not considered as transferring any property of his own, but as acting as servant to the assignee. This shews there is no sort of property remaining in the bankrupt. However it will be sufficient for my purpose, if we only suppose the property to be in abeyance, as in the common case of intestacy before administration; for then the goods were not *his*, and consequently not seizable.

Hussey v. Phidal, 12 W. 3. Rep. 12 Mod. 324. Holt 95. 1 Salk. 59.

2. If it would be thus in the case of the subject, let us see if there is any intervention of the prerogative, to give it a different turn. This indeed is the main point between us, for if he is considered as the debtor of the crown, and the warrant of the commissioners to be equal to an extent; I admit it will be against us, and the crown must take, the warrant coming before any assignment. And on the other hand, if the crown is out of the case, I apprehend it will not be disputed, but that the plaintiffs are intitled.

And I shall insist for the plaintiffs, that the collector is not to be considered as the debtor of the crown; but the receiver general is, and so is the division; and there is a plain reason for this distinction: the division is originally charged, and can no way be discharged, but by a payment to the receiver general. The collector is a middle man between them, in whom the crown re-

poses

poses no confidence, and therefore leaves him to be appointed by the division; and at the same time the crown reserves to itself the appointment of the receiver general, as the person by whose acts the crown may be affected. Had the act intended to turn the crown round to a remedy against the collector in the first place; it would only have provided, that what remained after disposal of the collector's effects, shall be levied on the division by a re-assessment. But lest such a construction should be made, there is added an express declaration, that payment to the collector is no discharge to the division, until the money is lodged in the receiver general's hands. The plain import of which is, Let the division take care who they send the money by, for he shall be considered as their agent, and not the crown's. If the crown was in any danger of losing the duty, there might be some colour to set up the prerogative; but here the duty is secured to the crown in all events by assessments and re-assessments. The receiver general is the crown's debtor, because the crown can resort to no one else, when the money is in his hands: but it's being in the collector's hands is a circumstance of no consequence to the crown, or that makes the least alteration. Put the case that I am debtor to the crown, and send my servant to the Exchequer with the money, and he neglects to pay it in; can that servant be said to be the debtor on whom the crown can levy the money? no: the crown considers me as the debtor still, and as the person who is to suffer by the other's neglect. Will any body say, the crown is bound to take the collector for its paymaster? the act provides for the contrary. [980]

Now if the crown has liberty to avow or disavow the payment to the collector. Then the divisions having once paid the money, and being bound to pay it again, is a bettering the condition of the crown; and no ease, but a load on the division.

There is one thing more to be considered, and that is; supposing the crown has its election, to resort to the collector or the division, and they are to be considered only as so many several securities to the crown; yet whether this warrant of the commissioners, which came before the assignment, is to be considered as equal to an extent, which I admit comes in time, if before the assignment. And I apprehend there is a great difference between them. An extent is a matter of record, an ancient common law process, and binds from the *teste* notwithstanding the statute of frauds, whereas this warrant of the commissioners is a mere matter in *pais*, the date whereof is of no consequence. And can it be imagined, that if the Parliament had intended to make the collector debtor to the crown, that they would not have left to the crown so noble a remedy as an extent; or at least have provided, that

that this warrant should be equal to an extent: whereas having not done so, but only impowered the commissioners to issue a warrant, and continued the charge on the division; it must be taken to be a provision in favour of the division, and for their reimbursement: that whereas without such provision, every man who is re-assessed, would have no other remedy, but a separate action for money had and received to his use, which would cer-
[981] tainly lie against the collector who receives and does not pay over; they shall now all have a more expeditious and less expensive remedy. This is finding a proper use for the warrant of the commissioners. It falls in with the declarations in favour of the duty, that the division is not discharged, until the receiver general has the money; and it falls in too with the different constitution of the two officers, for one of which the division is answerable, and not for the other. And therefore I hope this action of trover is well brought.

Lord *Hardwick contra* delivered (at another day) the resolution of the court.

This case has been properly divided at the bar into two points. First, what the consequence would be, if this is considered as between two subjects; and secondly, whether the prerogative of the crown makes any difference. And as to the first of these, we are all of opinion, that if this was a case between two subjects, the property of these goods would be in the plaintiffs. The commissioners of bankruptcy have neither by the 13 *Eliz.* nor the statute of *Jac.* 1. any property vested in them, but only a power to take order about them by their discretion. Sir *T. Jones* 196. And when they have once executed that authority by assignment, the property is in the assignees by relation from the time of the act of bankruptcy committed; and an executor taken after such act of bankruptcy, and before the assignment at the suit of a subject, will certainly be avoided (1): as was held in in *Cole* v. *Davis*,
L. Raym. 724. post. 996. 2 Burr. 814. *Hil.* 10 *W.* 3. and so is 3 *Lev.* 191, 69. for the execution is a *mesne* act, and as such will be avoided. *Salk.* 111. The property is not in abeyance until assignment, but remains in the bankrupt, according to *Salk.* 108.

But then secondly, we think here is such an intervention of the prerogative of the crown, as will defeat the plaintiffs in this

(1) *Vide Cooper* v. *Chitty*, 1 *Burr.* 20. 1 *Black. Rep.* 65. *S. C. Hitchin* v. *Campbell*, 2 *Black. Rep.* 827. That the assignees under these circumstances may either bring trover for the goods or assumpsit for the produce of the sale. But they cannot bring trespass against the sheriff. *Smith et al' assignee of Clarke* v. *Milles*, 3 *Term Rep.* 475. *Vide Cooke's Bank Law.* 679. 3 *ed.*

action.

action. For this purpose two things are to be considered; first, whether the money in the hands of the collector made him debtor to the crown for so much; and secondly, what effect the warrant and seizure will have in the present case.

And first we hold that notwithstanding the objections made at the bar, the collector is to be considered as the King's servant, and indebted to him. It is the King's money that is collected, and the allowance to the collector is not made by the division, but by the King: and though the division is liable for his imbezilments, yet that is only as so many several securities to the crown. To what purpose are powers given to the commissioners, to summon any person they suspect of imbezilling, if he is not considered as indebted to the crown? [982]

And as to the second thing to be considered, *viz.* what effect the warrant of the commissioners will be of: we do not think it is equal to an extent, so as to bind the goods from the date: but what we ground our judgment upon is, that until an assignment the property was in the bankrupt; that the crown's hands were upon these goods, and created a lien before the assignment, The crown is not bound by the acts relating to bankrupts, not being named. Sir *W. Jones* 202. and though the King is bound by an actual assignment, 2 *Show.* 481, yet that is because the property is then absolutely transferred to a third person (2). But relations, which are but fictions of law, cannot bind the crown. *Hob.* 339. And though the actual sale was not until after the assignment, yet the goods were *in custodia legis* before. *Cro. Car.* 148. Upon this seizure all the right which the assignees had, is to redeem the goods on payment of the money, which are in the hands of the commissioners as a pledge for that purpose. But they brought their action without payment or tender of the money, and consequently must fail in it.

The *postea* must be delivered to the defendants, and the plaintiffs must pay the costs of a nonsuit; which upon affidavit of the defendants acting as officers were ordered to be treble (3).

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(2) *Lechmere* v. *Thoroughgood*, 3 *Mod.* 236. *Comb.* 123. *S. C.* *Rorke* v. *Dayrell*, 4 *Term Rep.* 408.

(3) *Walker* v. *Sir Philip Egerton*, *Comb.* 322. *Hunt* v. *Robinson*, *Cas. Prac. C. P.* 16. *Rex* v. *Poland*, *ante* 49.

Dominus Rex *verſ.* Smith.

On a *habeas corpus* the court will not determine the right of guardianſhip but ſet the child at liberty. Cun. 75. S. C. more full.

A Boy between thirteen and fourteen years old was brought up by *habeas corpus* ſued out by his father, in order to have him delivered over to him by an aunt, who kept him, according to *Johnſon's* caſe (*ante* 579.) And now upon debate that caſe was over-ruled, and Mr. J. *Lee* ſaid, Lord *Raymond* repented of what was done in that caſe. And all the court declared, that upon this writ they could only deliver him out of the cuſtody of the aunt, and inform him he was at liberty to go where he pleaſed. And the boy choſe to ſtay with the aunt; and they ſaid that was all that was done in Lady *Catherine Anneſley's* caſe: that the right of guardianſhip could not be determined by them in this ſummary way, and the father was not without other remedy: he might have treſpaſs *quare filium et hæredem ſuum rapuit*, or other actions, that would properly bring the right of guardianſhip in queſtion (1).

(1) *Vide Rex* v. *Sir F. Blake Delaval*, where the judgment given here is approved of, but the *dicta are denied, and it is* laid down, "that the court are to "judge upon the *circumſtances of* "*the particular caſe*, and to give "their *directions accordingly*." And ſee *Rex* v. *M. Mead*, 1 *Burr.* 542.

[983]

Dominus Rex *verſ.* Bartlett et al'.

Seſſions cannot meddle with overſeers accounts till allowed by two juſtices. 2 Barn. B. R. 400, 462. 1 Bott. by Conſt. 264. pl. 290. much fuller.

AN order made at ſeſſions relating to accounts of overſeers of the poor was moved to be quaſhed, becauſe it did not appear the accounts had been before two juſtices *quorum unus*, and they cannot come *per ſaltum* to the ſeſſions; and *Salk.* 533. was cited. On the other ſide it was ſaid, that it appeared there was an allowance, for the appeal is ſaid to be againſt the diſburſements and *the allowance thereof*, which the court will preſume was regular; and being in general, is not like the caſe in *Salk.* which was ſaid to be by two juſtices without *quorum unus*. *Sed per curiam*, It does not follow that this was an allowance by two juſtices, for the pariſh might do it; and therefore for want of juriſdiction this order muſt be quaſhed (1).

(1) *Rex* v. *Whitear & al'* 3 *Burr.* 1365 S. P. after 17 *Geo.* 2. *c.* 38. *ſect.* 4.

Ruding *verf.* Newel. Ante 957.

THE plaintiff brought his *mandamus* to be reftored to the office of regifter of the archdeacon; and *non fuit appunctuatus* being returned, brought his action, and falfified the return: the defendant brought error in the Exchequer Chamber. And it was held to be a *fuperfedeas* to a peremptory *mandamus*.

No peremptory *mandamus* pending error on action for falfe return.

Taylor *verf.* Lowe.

I Moved on the authority of *Noaks* v. *Watts*, (*ante* 420.) that the plaintiff, who was a *pauper*, might be reftrained from going on to trial, till he paid cofts for former notices. But the court thought that cafe did not put it on a right foot, and that it was abfurd to make any rule about cofts, whilft the admiffion ftood; and therefore ordered plaintiff to fhew caufe, why he fhould not be difpaupered. And on affidavit of fervice made it abfolute.

How *pauper* fhall be punifhed for not going on to trial.

Salk. 506.

1 Phil. 126.

Dominus Rex *verf.* Inhabitantes de Sundrifh in Kent.

UPON a fpecial order of Seffions, it was ftated, that *Thomas Perch* by indenture dated 25 *March* 1701. demifed to *Thomas Gates* (the father of the poor perfon removed) a cottage with a garden, orchard and backfide, in *Hever* for 99 years, at 5 *s. per annum*, which was the full value for any thing that appeared to the contrary. That the father lived there till his death, and then by will gave it to his fon, who entered upon the premiffes, and becoming poor was removed. And the juftices at feffions confirm the order of removal.

A man cannot be removed from his term. Burr. Sett. Ca. 7. and Sett Ca. Ed. 1750. vol 1. No. 200. S. C.

[984]

Strange moved to quafh it, becaufe a man cannot be removed from his own eftate: and faid, it had been gradually determined, and was now fettled in the cafe of a term for years. It was firft held in the cafe of a freehold, *Salk.* 524. then in the cafe of a copyhold of fmall value, *Paf.* 11 *Ann.* between *Harrow* and *Edgeware*, and afterwards *Trin.* 4 *Geo.* 1. *int' paroch' Murfley* and *Grandborough*, where the affignee of a term of 99 years at 1 *s. per annum* rent was held to be fettled by being irremoveable.

Ante 97.

Et per curiam, This man does not come in to fettle after rambling about, as the ftatute 13 & 14 *Car.* 2. *c.* 12. has it: but comes to an ancient term, not newly created upon his arrival. In the

the case last cited the value of the whole was but 30 *s. per annum*, and the greatest part let off to others. But its being under 10 *l. per annum* shews, that the value is no more regarded in leaseholds than freeholds. As to the value in this case, it appears the justices never inquired into it, and from the particulars it must be above 5 *s.* (1) Therefore the order must be quashed.

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(1) The father had charged it and all other his estates with 20 *l.* to be paid to the mother for her maintenance. *Vide Burr.* S. C. 7.

Dominus Rex *verf.* Jeffs.

In what cases the King may withdraw a juror

HE was indicted for barratry; and after some strong proof, the prosecutor could not go on for want of a copy of several processes. Whereupon it was insisted to withdraw a juror, as it was done last term on an indictment against the scavengers of *St. Giles*'s for not paying money according to a justice's order; and there being some unpreparedness, Mr. *Abney*, one of the King's counsel, consented to withdraw a juror.

The Chief Justice at first inclined to it; but upon consideration held, that there was a difference between that case, which may be compared to cases of a civil nature, and this, where the punishment may be infamous, as the pillory; and for that reason it has never been done in perjury or forgery (1). And therefore he refused it in this case.

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(1) *T. Raym.* 84. *contra. Vide* the power of the court to discharge a jury charged with a prisoner in a capital case fully discussed. *Fost. Cr. Law* 23. But that learned judge is of opinion *that in capital cases* to discharge a jury after evidence given and concluded on the part of the crown *for want of sufficient evidence to convict in order to bring the prisoner to a second trial* (as was done in *Whitbread* and *Fenwick*'s case, 2 *St. Tr.*) is a most unjustifiable proceeding and ought never to be drawn into example. See 2 *Hawk. P. C. c.* 47. *f.* 1, 459. and the cases cited in the margin. 2 *H. H. P. C.* 294.

Holiday et al' verſ. Colonel Pitt.

THE defendant was a member of Parliament for *Camelford*. And on 16 *April* laſt the Parliament was prorogued: on 17th a proclamation was ordered to diſſolve it, which was publiſhed the 18th, and on 20 *April* the colonel was arreſted at the ſuit of the plaintiff, and being in cuſtody was charged with ſeveral other actions.

Members of Parliament have privilege of return after its diſſolution. They may be diſcharged on motion without filing common bail (1). Comyns 444. Caſ. Temp. Hard. 28, 37. Fort. 342. 2 Barn. B. R. 422, 433, 448. Cunn. 16. S. C. 2 Roll ...

In *Eaſter* term laſt he moved to be diſcharged: for that members had a privilege *redeundo* after the diſſolution, and the arreſt was within ſuch time of privilege.

After the matter had been ſpoken to in *B. R.* it was adjourned to *Serjeants-Inn*, to be argued before all the Judges. And the counſel for Mr. *Pitt* applied themſelves to three points. 1. To ſhew that there was a privilege *redeundo* after a diſſolution, as well as after prorogation, which was not diſputed. 2. To ſhew that Mr. *Pitt* was arreſted within that time of privilege. And 3. That this application for his diſcharge by way of motion was proper.

As to the firſt point: it was ſaid, that all privilege ariſes by preſcription time out of mind, and no new privilege can be created but by act of Parliament. Sir *Robert Atkins* in his treatiſe of the *Power of Parliament* 38, 39. That prorogations are modern, in compariſon with the antiquity of Parliaments; and it was not till the time of *Henry* 8. that the preſent frequent prorogations were made. Formerly two or three new Parliaments were ſummoned in one year, and diſſolved; and therefore the privilege *redeundo* (which it is agreed there is) muſt be after a diſſolution as well as a prorogation. It is the duty of members to ſtay the whole ſeſſion; and in 6 *H.* 8. *c.* 16. departing before the end of the ſeſſion is a loſs of wages; and in 4 *Inſt.* 44. there are many inſtances of informations by the Attorney General for departing from Parliament. In *Scobel's Memorials* 88. it is mentioned to be a privilege, *eundo morando et redeundo* for themſelves and ſervants, which is likewiſe mentioned *page* 103, 108. and in *Dewe's Journal* 414. *Dodderidge's* preface to the opinions of learned antiquaries, and Sir *R. Atkins* 38, 39. So in the article of

(1) *Vide Cheſter* v. *Upſdale*, 1 *Wilſ.* 278. that it is diſcretionary in the court to proceed by motion or by writ of privilege according to the particular circumſtances of the caſe.

wages, they were paid for ſome days after the diſſolution; 4 *Inſt.* 46. wages are due for every day, *veniendo, morando et exinde ad propria redeundo*, and the 35 *H.* 8. *c.* 11. gives them for as many days as may be reaſonably taken up in coming and returning. In the *Regiſter* 192. *a.* there is a writ to the ſheriff to levy 19 *l.* 4 *s.*
[986] *pro expenſis militum veniendo ad Parliamentum, ibidem morando, et exinde ad propria redeundo, pro* 48 *diebus.*

Another authority to ſhew that equal privilege ſubſiſts in returning as in coming, was from *Charta de Foreſta*, *c.* 11. *Quicunque Archiepiſcopus, epiſcopus, comes vel baro veniens ad nos ad mandatum noſtrum, tranſierit per foreſtam noſtram, liceat ei capere unam beſtiam vel duas per viſum foreſtarii ſi præſens fuerit; ſin autem, faciat cornare, ne videatur hoc furtive facere. Hoc idem liceat eis redeundo facere ſicut prædictum eſt.* And 4 *Inſt.* 308. was cited to prove that the words *veniens ad nos ad mandatum noſtrum*, were to be underſtood of coming to Parliament.

Another argument was drawn from 1 *Jac.* 1. *c.* 3. which was made to cure an inconvenience ariſing from this privilege as to members taken in execution out of the time of privilege, and to give the plaintiff a new writ of execution, when the time of privilege was over.

It may be objected, that theſe are not rights inherent in the commons, but what flow from the grace and favour of the crown, and on the beginning of a Parliament is aſked by the ſpeaker as ſuch. To which it is anſwered, that this is done rather by way of recognition, and keeping up their right, than acknowledging it as a favour. And it appears in *Dewe's Journal* 122. and Sir *R. Atkins* 40. that Mr. *Onſlow*, who was elected Speaker in 1566. neglected on his being preſented to Queen *Elizabeth* to demand this freedom from arreſts; and it was reſolved that ſuch demand was not neceſſary, and the privilege ſubſiſted notwithſtanding.

They likewiſe compared this to the caſe of witneſſes, who are protected *eundo et redeundo.* 1 *Mod.* 66. 2 *Roll. Abr.* 272. The ſame as to the parties to the ſuit; and *Raſtal*, tit. *Privilege*, uſes the words in the writ for wages, *et exinde ad propria redeundo.* And this returning has never been very nicely ſcanned, ſo as to require a man to go the direct road. *Bro. Privilege* 4. allows hat the protection is not forfeited by the plea of *extra viam*, becauſe it may be he went to buy a horſe, victuals, or other neceſſaries for his journey. Neither is the law ſo ſtrict in point of time, as to require the party to ſet out immediately after the trial is over; and for that was cited the caſe of *Hatch* againſt *Bliſſet*, *vide Trin.*

Trin. 13 *Ann. in B. R.* She had a trial at *Winchester* affizes, which was over on *Friday* at four in the afternoon: fhe ftaid there till after dinner on *Saturday*, and in the evening at feven was arrefted going home to *Portfmouth*, which is twenty miles: and the court held, that fhe ought to be difcharged, her protection not being expired, and a little deviation or loitering would not alter it. Rep. Gilb. 308. 4 Bac. Abr. 226. [987]

The ftatute 12 & 13 *W.* 3. *c.* 3. was alfo mentioned, as taking notice of this privilege of freedom from arrefts, and as making no diftinction between a prorogation and a diffolution.

2. The next point was to fhew that Colonel *Pitt* was arrefted within this time of privilege; and for this were cited 2 *Lev.* 72. 1 *Brownl.* 91. which fpeak of it as fubfifting for forty days after the Parliament, And in the *Irifh* acts 3 *Ed.* 4. (which were generally tranfcripts of laws enacted here) it is exprefsly recited to have continuance for forty days before and after the Parliament finifhed. However this point was not much infifted on, it appearing that the Houfe of Commons had always avoided determining this queftion, and had left it at large to a convenient time, of which themfelves were the Judges: and therefore in the cafe of Mr. *Martin* in 1586. who was arrefted twenty days before the meeting of the Parliament, the queftion was put, whether the Houfe would limit the time, and refolved they would not; but they held that the twenty days were within a convenient time, and that therefore Mr. *Martin* fhould be difcharged. *Scobel* 109, 110.

It doth not appear, they ever entered into the confideration of the nearnefs or diftance of each gentleman's borough; but hold the fame general rule, as it is done in *teftes* and returns of writs at common law; which are the fame near, as in the remoteft counties.

This gentleman was arrefted two days after the diffolution, before he had time to fettle his private affairs and prepare for his journey. And the cafes before cited of parties to a fuit and witneffes were again relied on, to fhew there was no occafion for him to fet out immediately upon his return.

3. The third point (and indeed the only one the court doubted of) was whether he could be difcharged by motion. And for this *Nalfon's Collections*, *Vol.* 2. *page* 450. was cited, where it is faid, that privilege of Parliament is a reftraint to the proceedings of inferior courts. That the courts of *Weftminfter-hall* are bound to take notice of this privilege, and allow the time out of the fta-

tute of limitations. That it is *ex necessitate*, else he must lie till the next Parliament, which may be sooner or later. That for expedition many things are now done in a summary way by motion, for which formerly the party used to be put to his *audita querela*; and in the case cited of *Hatch* v. *Blisset*, she was discharged by motion. So on 7 *Ann. c.* 12. the servants of ambassadors are every day discharged on motion; and yet there are [988] exceptions in that act, as to merchants and traders, which might be very proper for special pleading. And the statute 29 *Car.* 2. *c.* 7. against arrests upon *Sundays* was mentioned, where no doubt the party would be discharged on motion.

The counsel for the plaintiffs offered very little on the two first points; but applied themselves chiefly to the last, to shew that the discharge ought not to be on motion; and mentioned the case in *Salk.* 544. where it was held, that an attorney must plead his privilege: and *Carth.* 131. as to the act of oblivion. That the proper way would be to bring his writ of privilege, the suggestions whereof might be pleaded to, and this great point determined upon record. If there be no addition in an outlawry, it is bad; but must be avoided by writ of error. And wherever it has been intended to give a power of discharging on motion, it is mentioned particulary, as to bankrupts, and seamen.

There was nothing said upon the argument by the Judges at *Serjeants'-Inn*. But the last day of the term the Chief Justice declared, that all the Judges were of opinion, Mr. *Pitt* was intitled to privilege *redeundo* for a convenient time, and that within that time he was arrested.

And as to the third point he declared, that there was great doubt amongst the Judges; who however did all agree, that if a writ of privilege was procured, that would remove all difficulties: and therefore the rule was enlarged till next term, without prejudice to the question, whether it could be done by way of motion or not.

Early in the next term a petition was presented to the Lord Chancellor, with an affidavit to verify it. And upon presenting it, his Lordship said, that in so untrodden a path as this, he should be very careful what he did; and as it was not his business to draw the writ, he expected Mr. *Pitt*'s counsel should prepare one, and send him and the Master of the Rolls a copy of it: which was done, from *Pryn*'s 4th vol. of *Parliamentary Writs*, 722, 755, 759, 776, 784, and a day appointed to speak to it before them both. There were no counsel attended on behalf of the plaintiffs, the main point being determined against them. But

But several objections being taken to the manner of verifying the petition, and to the draft of the writ, the matter was put off, with an intimation that it was hardly probable any determination would be made within the term; and therefore recommending it to Mr. *Pitt*'s counsel, whether they would not try what they could do in *B. R.* upon their motion, before the term was over. [989] Upon this the petition was withdrawn, and mention made to the Judges of the King's Bench, that their opinion was desired upon the motion.

Whereupon the evening before the end of the term, the Judges all met again at *Serjeants'-Inn*. And the last day of the term the Chief Justice delivered their opinions.

That all the Judges, except the Chief Baron *Reynolds*, and Baron *Thompson*, were of opinion, that Mr. *Pitt* ought to be discharged on motion: that the Chief Baron did not say it would be wrong to do so, but was doubtful; and as for Mr. Baron *Thompson* he was strongly against it.

As what is to be done is therefore clearly the opinion of ten Judges, I will briefly state the ground they go upon. For that purpose they have taken two things into consideration. 1. How the law stood before the 12 & 13 *W.* 3. *c.* 3. and, 2. Whether that has altered the law, and how far.

As to the first we think that before the statute 12 & 13 *W.* 3. the method in *Westminster-hall* was, to discharge by writ of privilege, which was in nature of a *supersedeas* to the proceedings, and the pleading concluded, *si curia Domini Regis placitum præd' cognoscere velit aut debeat.* 1 *Pryn's Register* 660.

And as to the statute 12 & 13 *W.* 3. we think it has made two alterations. 1. That it has taken away the old plea of privilege; and, 2. By making the arrest irregular and illegal.

The act was designed to abridge the privilege, and to give leave to proceed after a prorogation. Then comes an enacting clause with negative words, that the body of a member shall not be arrested during the time of privilege. The old plea therefore of not proceeding is taken away, for it is made lawful to proceed, and he cannot plead to the process though irregularly arrested; agreeable to what was held in the case of *Widrington* v. *Charlton*, *Hil.* 11 *Ann.* in an appeal. If he cannot take advantage of this the old way, there is no other left but by motion; and it being rendered illegal to arrest the body, it is an irregular execution of the process. In Sir *Richard Temple*'s case in 1 *Sid.* 192. Raym. 12.

192. and 1 *Keb.* 727. the Judges told Sir *Richard* he muſt ſhew his return, *or* writ of privilege. Here the defendant has complied with the firſt part, hy producing the original return. In Lord *Banbury*'s caſe in *Salk.* 512. it is ſaid, they would not proceed to try his peerage by motion; but I have ſeen a manuſcript report of that caſe, where *Holt* ſays, if there had been no diſpute of the identity of the perſon, and the ſummons to Parliament had been ſhewn, he would have diſcharged him on motion. There was my Lord *Mordington*'s caſe in *C. B.* in my Lord *King*'s time: and he being a *Scotch* Peer was arreſted, and the act of Union having given them the privilege of *Engliſh* Peers, he was diſcharged upon motion (2).

In the preſent caſe here is matter of record produced to warrant the diſcharge, and if we have proper evidence, why ſhould not the remedy be ſpeedily applied?

It is certainly ſo, as mentioned at the bar, that ambaſſadors' ſervants, and perſons arreſted on a *Sunday*, are diſcharged on motion. There are many writs in *Raſtal* for diſcharging jurors, and witneſſes, and yet it is done every day by motion; and thoſe writs only prove, that it may be done another way. And the inclination of courts to diſcharge on motion has been ſo great, that the party arreſted may apply to the court under whoſe protection he is, or the court out of which the proceſs iſſues, which ever happens to ſit firſt.

And if in *Bliſſet*'s caſe the court above took notice of the privilege of the court of *niſi prius*, and diſcharged her; what reaſon is there we ſhould not pay the ſame regard to a ſuperior privilege?

There muſt be a rule to diſcharge the defendant out of the cuſtody of the marſhal.

See Dutton v. Pitt, Barnes 199. a. to 2 ed.

N. B. The rule was at firſt pronounced to be upon filing common bail: but before the court roſe, the Chief Juſtice ordered that part to be ſtruck out, becauſe it in ſome meaſure warranted the arreſt.

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(2) *Rep. Fort.* 165. *Vide* 2 *Cromp. Prac.* 138.

Michaelmas Term

8 Georgii 2 Regis. In B. R.

Philip *Lord* Hardwicke, *Lord Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq*;

John Willes, *Esq*; *Attorney General.*

Dudley Ryder, *Esq*; *Solicitor General.*

Case of the Borough of Warwick.

APPEAL from a poor's rate: and the sessions ordered the churchwardens to produce the books at an adjourned day, before which a *certiorari* was brought to remove that order; and held to lie, though the appeal is depending; else the order must be obeyed before the validity of it can be determined. *Certiorari.* Cunn. 99. S. C.

It was also held, that an appointment of overseers may be removed before an appeal to the sessions; for the rule laid down in *Salk.* 147. extends only to the case where there is a limited time for appealing, as to the next quarter-sessions; but the statute 43 *Eliz. c.* 2. is not so restrained: and consequently it can never be said, that the time for appealing is out. And if the appeal from an appointment is lodged, there can be no *certiorari*, till the sessions has made a determination, and a *certiorari* brought pending such appeal shall be superseded (1).

(1) *Vide Rex* v. *Harman*, *Andr.* S. C. *Rex* v. *Holditch*, 1 *Bott* by 343. 2 *Seff. Ca.* 201. *pl.* 147. *Const.* 53. *pl.* 60.

Rattle *verf.* Popham.

A power to grant a life eftate is not well executed by a leafe for 99 years determinable on a life.
Cunn. 102. S. C.

IN ejectment, it appeared, that upon a marriage fettlement, a power was given to every tenant for life when in poffeffion to limit the premiffes to any woman he fhould marry for her life by way of jointure and in bar of dower. The tenant for life made a leafe for 99 years determinable on the death of his wife: and it was held, that however fhe might be intitled to relief in a court of equity, yet at law it could never be faid to be an execution of the power: for the eftates are very different, one being a freehold and the other a chattel, and the freehold in her being a qualification to any after-taken hufband to be a member of Parliament, kill game, &c. And 8 *Co.* 69. *Ley.* 74. *Co. Litt.* 45. were cited, where the powers in bifhops or tenants in tail to make leafes have been held to be ftrictly purfued (1).

(1) The widow having brought her bill in chancery, Lord *Talbot* held the leafe to be warranted by the power, and that it was not a defective, but a blundering execution, and he decreed the defendant to pay all the cofts both at law and equity. *Per* Lord *Mansfield*, 2 *Burr.* 1147. *Zouch* v. *Woolfton*, in which cafe the court were of opinion, that whatever is an equitable, ought to be deemed a legal execution of a power.

Dominus Rex *verf.* The Juftices of Somerfetfhire.

Veftry cannot order overfeers to retain balance of their accounts.
2 Seff. Ca. p. 283. No. 174.
Cunn. 105. S. C.

MANDAMUS to the juftices, to grant a warrant for levying 30*l.* 17*s.* 11*d.* being the balance of the laft overfeers of the poor's account in their hands. They return, that true it is there was fuch a balance, but that the veftry had ordered them to retain it, and employ an attorney to fue for fome charity money, and get it laid out for the benefit of the poor; that one *Young* was fo employed, and the balance exhaufted in fees, and that the overfeers had engaged to pay *Young*; *et ea de caufa* they had refufed to grant the warrant.

Et per curiam, There muft go a peremptory *mandamus*, for the ftatute 43 *Eliz. c.* 2. fays, the balance fhall be paid over to the new overfeers, under a penalty: and it is not in the power of the veftry to difpenfe with the ftatute.

Smith *verf.* Dr. Bouchier et al'.

TRESPASS and falfe imprifonment againft five defendants. They all join in a plea of Not guilty as to all but eight days imprifonment, which they juftify, for that the chancellor and fcholars of *Oxford* were a corporation by prefcription, and that by act of Parliament, 13 *Eliz.* they were incorporated, and had power by cuftom to hold a court every *Friday* before the chancellor, his commiffary or deputy, for all perfonal actions, where either party was a fcholar, or had the privilege of the univerfity. That by the cuftom, a plaintiff making oath, that he has *a perfonal action* againft any perfon within the precincts of the univerfity, and *that he believes the defendant will not appear, but run away,* the Judge may award a warrant to arreft him, and detain him till fecurity given for his anfwering the complaint. That 7 *Auguft* 1731, the defendant *Bouchier* having the privilege of the univerfity, made a complaint to the defendant *Shippen* the vice-chancellor, of a perfonal action againft the now plaintiff, to his damage of 1000*l.* according to his eftimation, *and that he fufpected the now plaintiff would run away:* that he took his oath of and upon the truth of the premiffes, upon which a warrant was granted to the other defendants, who arrefted him, and kept him in prifon eight days for want of fureties; and traverfe their being guilty *aliter vel alio modo.* To this there was a frivolous replication, and to that a demurrer.

Juftification under procefs of univerfity of *Oxon* held ill, and where thofe who might juftify join thofe who have not a good juftification, it is bad as to all. Caf. temp. Hardw. 62. 2 Barn. B. R. 331. 2 Kely. 144. pl. 123. Cunn. 89. 127. S. C.

Strange pro quer' argued, 1. That the cuftom was bad; and 2. If good, yet it is not purfued.

His objections to the cuftom were all over-ruled, but were, 1. That the cuftom is to make oath that he has a perfonal action, not a caufe of action; fo he muft fwear to matter of law. *Sed per curiam,* That is no more than is done in many cafes. 2. In the cafe of a *ne exeat* there muft be oath of the parties, declaring he intends to go abroad; whereas here a bare belief is fufficient, without fhewing the grounds of it.

But upon the fecond head the court held that the cuftom was not purfued. 1. By the cuftom he is to fwear to *his belief* of the defendant's defign to run away; whereas the oath is only that *he fufpects it,* which is not the fame: that may be a ground for fufpicion, which will not induce a belief. 2. The oath is only of and upon the truth of the premiffes; now a man who fwears the premifes are falfe, does fo. *Hil.* 12 *Ann. Regina* v. *Green,* a conviction for felling bread quafhed, becaufe the wit- nefs

10 Mod. 212. cited ante 67.

nefs only fwore *de veritate præmifforum* (1). So *Paf.* 13 *Ann.* *Regina* v. *Gery*, *præftat facramentum de veritate materiarum in informatione contentarum*, was held ill.

For thefe reafons the juftification was held ill. And though fome of the defendants, as the officer and gaoler, might have been excufed, if they had juftified without the plaintiff, or the vice-chancellor (2); yet it was held, that by joining with them, as to whom the procefs was no juftification, they have forfeited their juftification (3); now the Judge and the plaintiff knew the oath was not fufficient. And 2 *Lutw.* 935. goes upon that, and fo did the cafe of *Philips* v. *Biron* (*ante* 509.) (4). Upon this foundation therefore the plaintiff muft have judgment againft all the defendants.

(1) *Rex* v. *Pullen*, *Salk.* 369. *contra.*

(2) All the reports of this cafe concur in making the court incline to this judgment upon the firft argument, but in *Cunn.* 127. Lord *Hardwicke*, in delivering the final judgment of the court, rather expreffed a contrary opinion, and in *Perkins* v. *Proctor*, 2 *Wilf.* 385. the court made a *quære* as to this *dictum*, for none could have juftified the whole proceedings, they being *coram non judice*, and a mere nullity. *Vide* *Hill* v. *Bateman*, *ante* 711. *Shergold* v. *Holloway*, *poft.* 1002.

(3) *Middleton* v. *Price*, *poft.* 1184. S. P.

(4) *Vide* alfo *Parfons* v. *Lloyd*, 2 *Black.* 845. and in *Perkins* v. *Proctor*, 2 *Wilf.* 382.

Tryon *verf.* Carter.

Immaterial iffue, Cunn. 71. 106. S. C. more full cited 1 Burr. 302.

A Bond was conditioned for the payment of money on or before 5 *December*. The defendant pleaded payment on the 5 *December*, to which there was a replication (1): and a verdict for the plaintiff. But a repleader awarded, as being an immaterial iffue, for it finds no breach of the condition, becaufe it might be paid before the 5 *December*, and then the condition is performed: and it is not like a cafe where a condition is to pay upon fuch a day, for then there can be no legal payment

(1) The replication as ftated in *Cunn.* 71. and *Bull. L. N. P.* 162, was, "that the money was not paid on that day," which was ill, for the defendant having pleaded a ftrict performance, and not a collateral matter, the replication ought not only to have met the defendant's plea, but have fhewn that the money was not paid at all. *Vide Fletcher* v. *Hennington*, *B. R.* 2 *Burr.* 944. 1 *Black.* 210. S. C. *Anon. C. B.* 2 *Wilf.* 173. *Bull. L. N. P.* 162.

ment till that day, an actual payment before being but in the nature of a depofit, till the day. But here it would be a legal payment at any day. *Vide ante* 493. *Colborne* v. *Stockdale*, 1 *Saund.* 102. *Jernegan* v. *Harrifon*, *ante* 317.

Dominus Rex *verf.* Ellis.

BY the charter of *New Romney* the new mayor is to be fworn before his predeceffor. At the election there were two candidates, *Ellis* and *Whitwick*; *Ellis* had the majority, notwithftanding which the mayor ordered *Whitwick* to be fworn; upon which the town clerk read the oath, and both *Ellis* and *Whitwick* had their hands upon the book, and kiffed it. Upon trial of the iffue, whether *Ellis* was duly fworn, it was ruled by *Eyre* C. J. *de C. B.* at *Maidftone*, that it was not a good fwearing; for as it is to be the act of the mayor, his affent muft go along with it: and that there is no difference between fwearing *by* and *before* the mayor. And now upon motion for a new trial the court were of the fame opinion, and there was judgment againft the defendant.

Where the mayor is to be fworn before the laft mayor there muft be his affent to the fwearing, and his prefence is not fufficient.

Howard *verf.* Poole.*

[995]

THERE was a joint commiffion againft the defendant and his partner. And the plaintiff was a feparate creditor of the defendant's, and arrefted and held him to bail. But on motion he was difcharged on common bail; the plaintiff being fuch a creditor, as might have come in under the joint commiffion (1).

Separate creditor may come in under a joint commiffion of bankruptcy. Cunn. 111. Lex. Merc. Red. 498. S. C.

*Note, the defendant had no feparate eftate, and all the joint effects were fwallowed up by the joint creditors, fo that the defendant's feparate creditors had nothing. MSS.

(1) *Wilkes'* v. *Strahan*, *poft.* 1157. S. P. The joint eftate is to be applied firft to pay the joint debts, and the feparate eftate the feparate creditors, and if there be a furplus of one, it is to go to fupply the deficiency of the other. *Ex parte Sandon*, 1 *Atk.* 68. *Ex parte Crowder*, 2 *Vern.* 706. *Ex parte Bond*, 1 *Atk.* 98. *Ex parte Rowlandfon*, 3 *P. Wms.* 405. *Ex parte Cook*, 2 *P. Wms.* 501. *Gofs* v. *Du Frefnoy*, *Davies* 373. As to the proof of joint debts under a feparate commiffion, *vide Cooke's Bank. Laws*, 3 ed. 298 to 319.

Dominus Rex *verſ.* Bell.

No new trial to be granted after four years acquieſcence. Cunn. 113.

AN information in nature of *a quo warranto* was brought againſt the defendant, to ſhew by what authority he claimed to be a common-council-man of *Marlborough:* and upon a trial in 1731, there was a verdict for the defendant.

This term the proſecutor moved for a new trial, as being a verdict againſt evidence; and the proſecutor referred to the report of the Judge, and inſiſted he was not too late, there being no judgment yet ſigned, according to the caſe of *Gilman* v. *Smith*, *Mich.* 9 *Geo.* 1. where it was held, that though the four day rule be out, yet it is ſufficient if they come before judgment. *Ante* 845.

But the court would not ſuffer the merits of the motion to be gone into, on account of the length of time ſince the verdict; it being poſſible that many men's rights might depend on the validity of this man's vote, which the corporation was bound to admit after a verdict eſtabliſhing his right. And it would be much leſs miſchief, to let this verdict ſtand (ſuppoſing it to be wrong) than introduce a general inconvenience. They ſaid all new trials were diſcretionary: and though my Lord *Holt* entertained a notion of their being ancienter than the caſe in *Stiles*, from the challenge we meet with in the old books, that the juror had before given a verdict in the ſame cauſe; yet it does not thence follow, that the court granted a new trial upon the evidence; for it might appear to be a miſ-trial upon the record, or there might be other reaſons to award a *venire facias de novo*.

Ante 392. 584.

[996]

Ruſh et al' aſſign' Ryland *verſ.* Baker.

Trover lies againſt taker in execution of bankrupt's goods, without joining the officer. Bull. L. N. P. 41. Cunn. 130. S. C. more full.

THE defendant was plaintiff in an action againſt *Ryland*, and took his goods in execution after an act of bankruptcy committed, but went on and received his money. And now trover being brought by the aſſignees, and a verdict in their favour; it was held on a motion for a new trial, that the action was well brought againſt the defendant, who received the money, without joining the officer.

Williams *verf.* Browne.

THE queftion in this cafe was, whether crofs remainders were created by implication from the words of a will. And the arguments of the counfel, and the refolution of the court, being the fame as in the cafe of *Cumber* v. *Hill*, *ante* 969. which was held not to differ materially from this; it will be only neceffary to fet down the words of this will, which for the reafons given in that cafe were held not to create any crofs remainder.

Of crofs remainders. 2 Barn. B. R. 238. 416. cited Andr. 134. S. C. MSS. S. C.

The devife was to *Mehetabel* for life, remainder to the ufe of all and every the child and children both male and female born and to be born of the body of the faid *Mehetabel*, equally to be divided between them, and of the heirs of their *refpective* bodies lawfully to be begotten, and for want of *fuch* heirs, the remainder over to another daughter *and her iffue, in the fame words* (1).

(1) *Vide Cumber* v. *Hill*, *ante* 969. where the principal cafes of raifing crofs remainders by implication, in a will between more than two, are cited in the notes.

Dominus Rex *verf.* Lloyd.

A Complaint in writing was exhibited to the quarter-feffions of *Cardigan* againft *Thomas Lloyd* clerk of the peace of that county, containing feveral charges of mifbehaviour, which if true, were a fufficient caufe to remove him from that office. The feffions received the complaint, and ordered *Lloyd* a copy, and time to make his defence. And on the day appointed, reciting the complaint and notice, " Upon due examination thereof " openly this day in court, and of the feveral matters and " charges therein contained and herein before partly fpecified, " alleged and charged againft the faid *Thomas Lloyd*, and upon " full hearing and examination of feveral witneffes and other " due proofs touching the feveral charges againft the faid *Thomas* " *Lloyd*, in the faid articles contained, openly this day in court " in the prefence and hearing of the faid *Thomas Lloyd*, " and of his counfel, who now attend in this court on " his behalf, and make a defence for him, and upon hearing " what is alleged and infifted upon by the faid *Thomas Lloyd*

On removal of clerk of the peace the evidence need not be fet out in the order. 1 Seff. Ca. p. 233. No. 190. 2 Barn. B. R. 302. 338. 466. Cunn. 84. 133. S. C.

"and his counsel in his defence; this court adjudges him guilty "of several of the articles, and remove him from his office pur- "suant to the statute."

A *certiorari* was brought to remove this into *B. R.* and *Denison pro defendente* objected, that this being a conviction in a summary way before justices of peace, and without a jury, and the statute 1 *W. & M. c.* 21. requiring the removal to be upon due proof of the misdemeanor complained of; the evidence in this case ought to be set out, that the King's Bench may see, whether there was due proof; and not trust the justices, who may have deprived the defendant of his freehold upon less evidence than they ought to have done, or perhaps upon that which is no evidence in point of law. The common law ranks trials by proof, or *per testes*, amongst the several sorts of trial, and there the evidence, or the substance of it, is set out in the record. *Rast.* 228. 9 *Co.* 3. 2 *Roll. Abr.* 577. *Co. Litt.* 6. *Co. Ent.* 463. *Cro. Eliz.* 736. 1 *And.* 20. And so it is on demurrers to evidence. In convictions about the game, the evidence is always set out.

Strange contra, The statute on which this is founded, gives power to the quarter sessions, on a complaint and charge in writing to be exhibited against any clerk of the peace of any misdemeanor by him committed, to examine into the same *openly* in their general quarter sessions, and *upon such examination and due proof*, to suspend or discharge him from his office. By this act three things are required. 1. A misdemeanor; 2. A complaint thereof in writing; and, 3. Examination and due proof openly. All which the proceedings shew to have concurred in the present case. For as to the first, It is not disputed, but here are such facts alleged, as if true, are a great misdemeanor. As to the second, here is a complaint of them in writing. And as to the third, the words of the act are complied with, and the intent too; for the record says, it was upon examination openly and due proof.

But to this it is objected, that this is in nature of a conviction in a summary way; and that therefore the evidence ought to be set out, that this court may see there was due proof, and the cases of convictions have been cited for that purpose. And I do admit, that in the cases of convictions before one or two private justices, the authorities are, that the evidence should be set out, that it may appear, the informer was not admitted a witness. But this case differs widely from them. 1. As this is an order, and not a conviction; 2. As it is a proceeding at sessions, and not before private justices.

As to the firft, there is a ftanding diftinction between orders and convictions. Thefe orders, like all others, are drawn up in *Englifh*, but convictions in *Latin*. Is this more like a conviction than an order of baftardy, where the evidence never is fet out, but a general adjudication of being the putative father? In cafes of orders of fettlement, and for wages, the court gives that credit to the general adjudication, that they prefume it to be right, unlefs the contrary appears. *Salk.* 442. And this indulgence has been extended to convictions. *Trin.* 9 *Geo.* 1. *Rex* v. *Ford*, In a conviction for keeping an alehoufe on 3 *Car.* 1. *c.* 4. it was excepted, that the juftice could not proceed if the party had been punifhed by 5 & 6 *Ed.* 6. *c.* 25. there being a claufe of exemption in 3 *Car.* but the court held, that need not be fet out, and they would not prefume a want of jurifdiction. So in the cafe *Rex* v. *Theed*, *Mich.* 11 *Geo.* 1. conviction for obftructing an excife officer: and objected, that they fhould fhew it was in the day, elfe he may be obftructed, if he comes without a conftable. *Et per curiam*, It is enough the conviction does not appear to be wrong. And even in the cafe of convictions on the game laws, though the court will not allow the witnefs to fwear generally that the party is not qualified (1); yet the general allegation is fufficient, where it is the words of the juftice.

Ante 555. 8 Mod. 174.

L. Raym. 1375. Ante 608.

But fecondly, this is an order of feffions, where the evidence never is recorded: and it would be extraordinary to expect it fhould be taken down, it concerning the defendant, who was the officer till the evidence was over. The act requires the proof to be openly in court, which muft be underftood *viva voce*; and the fame claufe requiring the complaint to be *in writing*, as oppofed to the word *openly*, fhews it it was never expected the evidence fhould be taken down. This court always pays regard to the method of proceeding in inferior courts; and I put it on the other fide to fhew one order of feffions, where the evidence has been fet out. There have been but three of thefe orders before, *Regina* v. *Baines*, *Rex* v. *Horwell*, and *Rex* v. *Harland*: and they are in the fame manner, upon examination and due proof; and therefore this, if it be an error, is juftified by precedent.

L. Raym. 1199. Salk. 680.

And as to the objection, that it is to deprive him of his freehold, and therefore the court fhould fee it is done upon legal evidence: the fame may be faid, even where there is a verdict, for there the court direct what fhall be admitted as evidence, and are as liable to miftake.

(1) *Vide Rex* v. *Marriot*, *ante* 66.

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The court took time to consider of this case, and this term the Chief Justice delivered the resolution of the court.

Chief Justice, It is fully settled, that in convictions the evidence must be set out; and if this was to be considered as a conviction, it therefore would be bad (2). But we are all of opinion, it is to be considered as an order. In the three cases which have been upon the act, the *certiorari's* were to remove them as orders, and they are in *English*, which could not be, if they were convictions. *Baines's* case was before all the Judges, and they treated it as an order. And though it is said, here is a punishment that follows, *viz.* the loss of the office; yet the same may be said of most of the acts of justices, where very severe penalties often follow. The cases of orders of bastardy are very strong, which are grounded on much the same words in 18 *Eliz. c.* 3. as are in 1 *W. & M. c.* 21. And as to the cases of setting out evidence on demurrers; it is absolutely necessary to have it on record, and the superior court are Judges of the fact, as well as the law; which on a *certiorari* we are not.

This exception was taken in the case of *Horwell* by Mr. *Lechmere*; but the defendant died before any thing done upon it. And as to *Baines's* case, it is a strong negative authority, for that was greatly canvassed at the bar and bench, and yet this exception not taken. At first we thought this a strong objection: but are convinced, there is this distinction between orders and convictions, and the precedents are not to be shaken. This therefore, being an order, must be confirmed.

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(2) *Vide Rex* v. *Theed*, *ante* 919.

Dominus Rex *verf.* Robe.

Judgment arrested for the generality of the charge in an information (1). 1 Barn. B. R. 165. 191. 623.

AN information was filed against him for several illegal exactions in his office of clerk of the market, and there were several counts specifying sums taken of particular persons; upon all which distinct charges the defendant was acquitted; but at the close of the information there was a general charge, of which he was found guilty, *viz.* that under colour of his said office he did illegally cause his agents to demand and receive of

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(1) *Vide Davy* v. *Baker* in an action on statute of bribery, 2 *Geo.* 2. *c.* 24. S. P. 4 *Burr.* 2471. 2 *Hawk. P. C. ch.* 25. *sect.* 57. *p.* 321.

several

feveral other perfons feveral other fums of money, on pretence of weighing and examining their feveral weights and meafures. Exception was taken, that this is fo general a charge, that it is impoffible any man can prepare to defend himfelf on this profecution, or have the benefit of pleading it in bar to any other: and for this fault the judgment was arrefted. *Ante* 2.

Lord Clinton *verf.* Morton. [1000]

THE defendant infifting upon his difcharge many years ago under a commiffion of bankruptcy, and it being doubtful whether the claufe that enabled bankrupts to plead generally was ftill in force (1); he moved, and had leave to plead it both ways, generally and fpecially: which I take to be a new cafe upon the act, the words whereof are only, that he fhall with leave of the court plead feveral matters. *Strange pro defendente*, and advifed the motion. Pleading double.

(1) That it is, *vide Price* v. *Alfop, Doug.* 160. *Cooke's Bank. Laws* 585. 3 ed.

Philips *verf.* Wood et al'.

LEAVE was given to plead *non affumpfit*, and a difcharge by bankruptcy, though faid to be denied in *C. B.* (1) Plead double.

(1) *Newman* v. *Chander, Fort.* 336. *contra.*

Lumley *verf.* Palmer.

THE defendant was fued as acceptor of a bill of exchange. And upon the evidence it appeared to be a parol acceptance only, which the Chief Juftice ruled to be fufficient, that being good at common law, and the ftatute 3 & 4 *Ann. c.* 9. which requires it to be in writing in order to charge the drawer with damages and cofts, having a provifo that it fhall not extend to difcharge any remedy that any perfon may have againft the acceptor. Upon this direction the jury found for the plaintiff. But the Chief Juftice of the Common Pleas having lately ruled it otherwife in the cafe of *Rea* v. *Meggott*, the court was moved for a new trial. And in order finally to fettle this point, it was ordered to be argued: and after argument the court was of opinion, that the direction in the prefent caufe was right, and agree-

A parol acceptance is fufficient in action againft the acceptor. Caf. temp. Hardw. 74. More full Bacon's Abr. 611. S. C.

agreeable to conftant practice, and therefore ordered the *poftea* to the plaintiff (1).

N. B. Trin. 10 Geo. 2. *Lord* Hardwicke *faid at* Guildhall, *that on conference with the Chief Juftice of the Common Pleas, he waived his opinion, and faid, he thought the King's Bench had done right in this cafe.*

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(1) *Acc. Erfkine* v. *Murray, ante* 817. *Julian* v. *Shobrooke,* 2 *Wilf.* 9. In *Pillans* v. *Van Mierop, per* Lord *Mansfield,* 3 *Burr.* 1672. *Conced.* in *Sproat* v. *Matthews,* 1 *Term Rep.* 182.

Dominus Rex *verf.* Johnfon et al'.

Challenging the array, where a contempt. Bull. L. N. P. 305. S. C. but made a quære.

THE defendants in an information *in natura de quo warranto* obtained the common rule for a fpecial jury, which was drawn up as ufual, for the fheriff to attend with the freeholders' * book, and that he fhould return the twenty-four ftruck by the mafter. The profecutor took out the *venire* to the fheriff of *Chefhire*. And the defendant challenged the array, on account of an intereft the fheriff had, as being a freeman of *Chefter*, whofe rights were to be tried. And upon arguing this challenge before the *Chefter* Judges, *viz.* Mr. *Verney* and Mr. *Jeffop*, they were of opinion to allow the challenge; though it was much infifted on, that fince the late act the fheriff had no influence, he being only to return the lift brought him as ftruck; but the right of challenging not being taken away, nor his power of marfhalling the panel and putting which he pleafed firft, it was determined to be a good challenge, and the array was quafhed.

[*1001]

It was then moved, that an attachment might iffue againft the defendants as for a contempt in challenging contrary to the rule of court; and the cafe of *Burridge* (*ante* 593.) was cited, where on a rule by confent for a fpecial jury, he challenged the array for want of hundredors, and the court granted an attachment againft him. But the court did not feem to relifh that cafe; and faid it might be an authority in one exactly circumftanced as that was, but in no other. That in the prefent cafe, though the fheriff is mentioned in the rule, yet that is only as he is the ufual officer; but it did not preclude the profecutor from taking the *venire* to the coroner. And the court remembered in what manner the motion was made by *Strange*, *viz.* that wherever the profecutor thinks fit to take his *venire*, there may be a fpecial jury.

Between the Parishes of St. George Hanover Square *and* St. James Westminster.

UPON an order of sessions the case was stated specially, that *Alice Wheeler* a parish girl was bound by indenture an apprentice to *George Wheeler* in *St. George*'s parish, where she served forty days; and her master afterwards let her out for hire to a person in *Marybone*, where she resided above forty days, but the master received her wages and found her cloaths.

Poor. Burr. Sett. Ca. 12. more full. and Seff. Ca. Ed. 1750. vol. 2. No. 138. S. C.

The sessions held, that the last service gained her no settlement, and consequently she was settled at *St. George*'s. But the court quashed the order, being of opinion, that there was no difference between the master's hiring her out, and her own act; and that it was like the case of a binding to *A.* and serving *B.* where it has been always held to be a settlement in *B.*'s parish. So the order of sessions was quashed (1).

Ante 10. 54.

(1) *Rex* v. *Inhabitants of East Bridgeford, Burr. S. C.* 133. *Rex* v. *St. Petrox, ib.* 248. *Rex* v. *Clapham, ib.* 266. *Rex* v. *St. Mary Kallendar in Winchester, ib.* 274. *Rex* v. *Tavistock, ib.* 578. *Vide* also *id. lib. No.* 133. 142. 164. 174. 180. 193. 239. 250. 256. Some of these cases turn upon the *assignment* of the apprentice; others upon his serving another master by consent without an assignment, and others upon his discharge. But in all of them it is considered what shall, under the particular circumstances of each case, amount to such a service under an indenture as will be sufficient to gain a settlement. *Burr. S. C.* 16. note.

Shergold *versf.* Holloway.

[1002]

A Justice of peace granted his warrant directed to the defendant in these words, "Whereas complaint is made to "me on the oath of *John White*, that *William Shergold* refuses "to pay him wages; these are to require you, to cause the said "*Shergold* to appear before me or some other justice, to answer "the complaint aforesaid; and give notice to the said *White*, "before what justice you appear."

Of the jurisdiction of justices as to wages. 2 Sess. Ca. p. 100. No. 100. more full S. C.

Upon this the defendant took up the plaintiff, and carried him before the justice, who bound him over to the sessions; upon which the plaintiff brought his action, and a case being made at the assises, the same was argued above, and these points resolved.

1. That though the ſtatute 5 *El. c.* 4. does not expreſsly impower the juſtices to order the payment of wages; yet they have been ſo long indulged with it by the courts, under the general power of ſetting the rate, that it is not now to be diſputed (1).

2. That the juſtice has no power to grant a warrant to apprehend the party, he can only iſſue a ſummons. And that a warrant expreſsly to arreſt the party will not juſtify the officer, there being no pretence for ſuch a juriſdiction (2).

3. That this, though oddly worded, was not a warrant to arreſt the plaintiff. For the defendant might cauſe him to appear by diſtreſs, and it was not equivalent to the words *bring before me*. So the plaintiff had judgment.

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(1) *Vide Rex* v. *Helling*, *ante* 8. 711. *Smith* v. *Boucher*, *Cunn*. 127.
(2) *Vide Hill* v. *Bateman*, *ante* *Ante* 994.

The Bank of England *verſ.* Morrice.

Amendment. 2 Barn. B. R. 183. 374. 2 Kely. 165. S. C. cited Andr. 110.

TO a plea of ſeveral ſpecialties in an action on ſimple contract, the plaintiffs replied *aſſets ultra*; which was found for them, but the verdict ſet aſide. They then moved for leave to alter their replication, and reply fraud; and cited 3 *Lev.* 368. But the court ſaid, there muſt have been ſome conſent in that caſe, elſe it is an authority for withdrawing all vitious pleading at any time. And here it might be dangerous, becauſe the defendant on the former iſſue might have paid away aſſets, as knowing that replication could not hurt her. So it was denied to amend (1).

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(1) *Vide Alder* v. *Chip*, 2 *Burr*. 755. *Hutchinſon* v. *Brice*, 5 *Burr*. 2692.

Hilary Term

8 Georgii 2 Regis. In B. R.

Philip *Lord* Hardwicke, *Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq*;

John Willes, *Esq*; *Attorney General.*
Dudley Ryder, *Esq*; *Solicitor General.*

Case of the Borough of Bossiny, alias Tintagel in Cornwall.

Mandamus may be granted to go to an election, though there is a mayor *de facto*, if he have no colour of right. 3 Bac. Abr. Mandamus (E.) 540. S. C. 15 Vin. Abr. 216. (Z.) pl. 1.

THE court was moved for a *mandamus* on the statute 11 *Geo.* 1. *c.* 4. to go to the election of a mayor. Which was opposed, on a pretence that on the usual day one *Robins* was chosen and sworn into the office; and therefore as there was an actual officer, they ought first to oust him. But the court (upon consideration) held the writ ought to go, the act saying, If no *due* election was made, and this of *Robins* having no shadow of right: the intent of the act was to give the corporation a rightful officer as soon as might be, whereas this pretence would waste the whole year; they said, this was not laid down as a general rule, for it might be otherwise where there was a probable election and room to doubt (1); and that these

(1) *Vide* case of *Aberystwith*, *post.* 1157. *Rex* v. *Bankes*, 3 *Burr.* 1454. 1 *Black.* 445. S. C. *Rex* v. *Mayor*, *Bailiffs*, &c. *of Cambridge*, 4 *Burr.* 2008. *Rex* v. *Newsham*, *Pasc.* 1755. 28 *Geo.* 2. cited *ib.* 2009. But the mayor *de facto* must be made party to the rule to shew cause. *Rex* v. *Bankes ut supra.*

writs were difcretionary: befides there was no harm done, for it is not a peremptory *mandamus*, and they may return that there is a rightful officer (2).

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(2) *Vide Rex* v. *The Mayor, &c. of York*, 4 *Term Rep.* 799.

[1004]

Sir John Lade *verf.* Shepherd.

By fetting out a highway the owner does not part with the property of the foil.
1 Burr. 136.

UPON trial of an action of trefpafs a cafe was made, that the place where the fuppofed trefpafs was committed was formerly the property of the plaintiff, who fome years fince built a ftreet upon it, which has ever fince been ufed as a highway. That the defendant had land contiguous parted only by a ditch, and that he laid a bridge over the ditch, the end whereof refted on the highway. And it was infifted for the defendant, that by the plaintiff's making it a ftreet, it was a dedication of it to the publick; and therefore however he might be liable to an indictment for a nufance, yet the plaintiff could not fue him as for a trefpafs on his private property. *Sed per curiam*, It is certainly a dedication to the publick, fo far as the publick has occafion for it, which is only for a right of paffage. But it never was underftood to be a transfer of the abfolute property in the foil (1). So the plaintiff had judgment.

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(1) That he may recover it in ejectment *vide Gooditle ex dem. Chefter* v. *Alker*, 1 *Burr.* 133. See alfo *Selman* v. *Courtney*, *Tr.* 13 & 14 *Geo.* 2. cited *ib.* 135. 136. 143. 3 *Com. Dig. Chimin*, (A. 2.) 27.

Between the Parifhes of Denham *and* Dalham in Suffolk.

Two houfes in an extraparochial place are not enough to denominate a ville.
Burr. Sett. Ca. 35. and Sett. Ca. Ed. 1750. vol. 2. p. 250. No. 171. S. C.
Caf. temp. Hard. 102.
Cunn. 163. S. C.

UPON a fpecial order it was ftated, that *Walker* hired a farm in *Denham* above 10 *l. per annum*, and lived on it from 1725 to 1730, and paid parifh rates: that then he went and lived for feveral years on 150 *l.* in *Southwold*, which is an extraparochial place confifting of two houfes and 300 acres of land belonging to and in the occupation of different perfons. But it not appearing there had been any overfeers of the poor, the feffions confirm the order of two juftices for fending him to *Denham*.

Strange moved to quafh both, it having been determined, *Salk.* 486. and in the cafe of *Rufford* (*ante* 512.) that a fettlement may be gained in an extraparochial place containing more houfes than

than one, so as to come under the denomination of a *ville* or township, the power in 43 *Eliz. c.* 2. in parishes being by the statute 13 & 14 *Car.* 2. *c.* 12. extended to all townships and villages.

Sed per curiam, That was a pretty liberal construction on the statute, which plainly related to townships in large parishes; but *two* * houses are not enough to bring it within the denomination of a *ville* or township, 1 *Inst.* 115. It must consist *de pluribus mansionibus et vicinis*, and should have a petty constable. 1 *Mod.* 78. This does not appear to have the reputation of a *ville*. So the orders must be affirmed (1).

*See post. 1071. five houses, n. to 2d. ed.

(1) *Rex* v. *Showler and Atter*, 3 *Burr.* 1391. *Rex* v. *The Inhabitants of Belvoir*, 2 *Sess. Ca.* 111. *pl.* 105.

2 Ham 2 R

Crew qui tam vers. Saunders. [1005]

No access to books of post-office in collateral actions.

AN action was brought against the defendant on the statute 9 *Ann. c.* 10. § 44. for intermeddling in elections, being post-master at *Nantwich*. And it was moved on behalf of the plaintiff for liberty to inspect the post-office books, and take a copy of his deputation.

This was opposed by *Strange* on behalf of the post-office, who were no parties to the suit. And he cited *Hil.* 12 *Ann.* where the college of physicians sued Dr. *West* (*a*) for practising without licence, and he was denied leave to inspect the books; and *Trin.* 11 *W.* 3. *Underhil* v. *Durham* (*b*), where in ejectment the plaintiff claimed under a bishop's lease made before the restraining statute, to commence on the expiration of a former, which the plaintiff could not produce; and he was denied to inspect the books of the dean and chapter, they being no parties. And likewise the case of *Shelling* v. *Farmer*, *ante* 646.

(*a*) Cited 1 Wils. 240. *Granvelt* v. *Burrel*, 1 Ld. Raym. 252. Salk. 44. S. P.
(*b*) Freem. 509. Rep. also 1 Salk. 256. but not S. P. Holt 264. Colles P. C. 338.

Bootle contra compared it to the case of court rolls, and entries in the custom-house, bank, and *South-sea* books. *Sed per curiam*, Inspecting court rolls was the original of these motions; but then it was confined to the case of persons interested, the rolls being the common evidence, which of necessity must be kept in some one hand. But lords and tenants of different manors have always been denied as strangers. In the case of publick companies it is restrained to the entry which concerns the party himself. And as to the custom-house, they are really the merchants books for that purpose. The constitution of the officer is private,

13 Burr 416
1 Eras 64
11 Price 736
8 Mod 1 Vels
2 Co Inst 7
2 T R 232
Holt 463

vate, and therefore not neceffary for the plaintift to prove; and as againft the defendant, his acting will be fufficient. The plaintiff took nothing by his motion (1).

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(1) *Benfon* v. *Port*, cited 1 *Wilf.* 240. *Vide Rex* v. *Cornelius*, *poft*. 1210. *Rex* v. *Fraternity of Hoftmen*, *poft*. 1223. and the cafes there cited.

Dibben *verf.* Cooke et al'.

8 & 9 W. 3. c. 11. Trefpafs on the cafe is not within the ftatute *W*. 3. that gives cofts to an acquitted defendant (1). Cunn. 132. S. C. but no decifion.

AN action on the cafe for a nufance was brought againft two defendants. There was judgment by default againft one, and the other on Not guilty was acquitted. And the queftion was, whether he was intitled to his cofts.

And upon confideration the Chief Juftice delivered the opinion of the court, that he was intitled to no cofts. Before the ftatute 8 & 9 *W*. 3. *c*. 11. if one defendant was acquitted, he was not intitled to his cofts; the courts conftruing the former acts to relate only to the cafe of a total acquittal of all the defendants. This being inconvenient, the 8 *W*. 3. *c*. 11. came and gave cofts where one of the defendants is acquitted, unlefs the Judge certifies a reafonable caufe to make him a defendant. And that act extends to trefpafs, affault, falfe imprifonment, and ejectment. The prefent action is trefpafs on the cafe: and though that be a fpecies of trefpafs, and in the cafe of the ftatute of Limitations, the word *trefpafs* in the provifo has been extended to actions on the cafe; yet confidering thefe acts giving cofts have always been looked on as penal acts not to be extended by equity, and therefore an avowant not within the word plaintiff, *Carth*. 179. we muft take it only to mean the general fort of trefpafs *vi et armis*, 10 *Co*. *Marfhalfea* cafe. And he faid this was the rule in *C. B.*

[1006]

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(1) *Vide* the authority of this cafe relied upon *per* Lord *Manffield* in *Ingle* v. *Wordfworth*, 3 *Burr*. 1287.

Dominus Rex *verf.* Epifcopum Landaff.

In a *quare impedit* the crown as well as the fubject muft alledge a prefentation. A *commendam retinere* does not amount to one. But where the verdict finds that the crown was feifed in fee *ut de uno Groffo* it cures the want of the allegation. 2 Barn. B. R. 72. 189. 371. 2 Kely. 275. S. C.

ERROR of a judgment in the court of grand feffions in *Wales* in a *quare impedit* brought by the King againft the bifhop of *Landaff*, *Francis* lord *Brooke*, and *Thomas Humfreys*, clerk,

clerk, for the church of *St. Andrew* in the county of *Glamorgan*. The count set forth the statute 25 *H.* 8. *c.* 21. against suing to *Rome*, and impowering the archbishop of *Canterbury*, under particular restrictions, to grant licences and dispensations, that used formerly to be sued for to the bishop of *Rome*. That Queen *Anne* in right of her crown was seised of the advowson in gross, and *John Tyler* being elected bishop of *Landaff*, the Archbishop of *Canterbury* 24 *June* 1706. (the church being then vacant) by his letters patent of dispensation, reciting that the new elected bishop had represented the revenues to be too small for the dignity, prayed for a dispensation to hold this church and other ecclesiastical preferments *in commendam*; the Archbishop accordingly grants the same, provided they were confirmed by the crown. Then sets forth a confirmation under the great seal duly inrolled, by virtue whereof *Tyler* became capable to retain the said church *in commendam* with his bishoprick to which he was promoted; and whilst he continued parson Queen *Anne* died, and *George* 1. succeeded, in whose time the church became void by the death of *Tyler*; *unde* it belonged to the late King to present, who died during the vacancy, and it descended to his present Majesty, who ought to present, but is hindered by the defendants.

The bishop's plea is, that he claims nothing but as ordinary. The Lord *Brooke* pleads in bar, that *William* Lord *Brooke* his father was seised of the moiety of the manor of *Dinas Powys*, in his demesne as of fee, to the moiety of which manor the half of the advowson of this church belongs, to present in every second [1007] turn; and the church being void he presented the other defendant *Humfreys*, who was instituted and inducted, and is parson thereof; and the advowson on the death of the father descended to the present Lord *Brooke*; and traverses the seisin of Queen *Anne* as laid in the count.

The defendant *Humfreys* pleads in the same manner; and there is the common replication, and judgment on the plea of the bishop; and then the Attorney General takes issue on the traverse of the Queen's seisin; which on trial is found for the crown, and judgment entered for the King, on which the general errors are assigned.

This cause was argued several times at the bar before the death of Lord *Raymond*, and the opinion of the court given in favour of the plaintiff in error on the three points under-mentioned. But the fourth point upon the verdict being then started, it stood over to be argued upon that only. Then the Chief Justice dying, it was thought proper to be argued again at large. And my argument for the plaintiff in error taking in all that was said on that side

side of the question, and the resolution of the court being an answer to it, there is no occasion to report any more of this case.

Strange pro quer' in errore argued, 1. That generally in a *quare impedit*, which is a possessory action, the crown as well as the subject must shew a presentation: and though there may be cases, wherein it is not required, as being impossible; yet those are considered as exceptions to the general rule, and the particular circumstances must be shewn, to bring it out of the general rule, and within the exception, by counting on the special matter. 2. That this is not a *commendam accipere*, but a *commendam retinere*. 3. That though a *commendam accipere* does amount to a presentation, yet a *commendam retinere* does not. 4. That if these points are with me, then it will come to the question, whether the joining issue on the seisin alleged in the count, and the verdict finding the Queen to have been so seised, does not cure the defect in the count in not alleging the presentation, which I shall contend it does not.

I am to shew, that in a *quare impedit* the crown as well as the subject must shew a presentation, it being a possessory action, and that though there may be cases wherein it is not required as being impossible, yet these are considered as exceptions to the general rule, and the particular circumstances must be shewn, to bring it out of the general rule, by counting on the special matter. *F. N. B.* 33. *H.* runs thus: a man shall not have a *quare impedit*,
[1008] if he cannot allege a presentation in himself or in his ancestors, or in any other person from whom he claims the advowson, and that in his count, unless in some special case; as if a man at this day erect a church parochial by licence from the King, which shall be presentable; if he be disturbed to present the same, he shall have a *quare impedit* without alleging a presentation in any person, and shall count upon the special matter. And under the subsequent letters *I.* and *K.* he puts two other instances, in both which the want of alleging a presentation may be excused by
16 H. 7. 8. *a.* counting upon the special matter. So in 2 *Roll. Abr.* 378. *pl.* 1. if the King be intitled to an advowson by office, he shall have a *quare impedit* without a presentation, for the office puts the King in possession, and any one else out of possession. So in *pl.* 5. if the King is seised of an advowson which has been always in proper use, he shall have a *quare impedit* without alleging a presentation. And in 2 *Roll. Abr.* 376. *R.* 1. it is said, this writ is intirely in the possession, and the presentment is the possession. In *Vaugh.* 53, 56, 57. it is held, that unless it be in special cases, both seisin and presentation are necessary to be alleged, and a seisin without a presentation, or a presentation without a seisin, are equally naught; and the law (says the book) is the same in the case of the King as a subject Agreeable to this is 2 *Roll. Abr.* 378.

378. *pl.* 6. if the King has caufe to prefent, by having the temporalties of the bifhop, he fhall not have a *quare impedit* without alleging a prefentation. And in the cafe before cited *pl.* 5. it is implied, that the King muft make his excufe as well as a common perfon. The precedents of *quare impedit* brought by the crown fall in with this. *Vaugh.* 53. *Skinn.* 651. *Co. Ent.* 493. *a.* 494. *a.* 509. *a.* 512. *a.* 514. *a.* 516. *b.* 520. *b. Raft.* 505. *a*, 528. *a.* 528. *b.* 529. *b.* 530. *a. b.* 531. *a. Lutw.* 1078, 1083. 1090. *Lev. Ent.* 144. 14 *Hen.* 4. 36. *b.* There are many others in every book of entries, under the title *quare impedit*, all which fhew the opinions of thofe who were concerned for the crown, elfe they would never have fallen into a courfe of precedents contrary to the prerogative, which in other parts of pleading is conftantly maintained. And thefe verify what Lord *Vaugh.* 57. fays, that the books and precedents all fhew the law to be the fame in the cafe of the King as of a common perfon. And no ftronger argument can be brought to prove it fo, than the adjudged cafes which are exceptions out of the general rule; which would never have borne any debate, if that fhort anfwer could have been given, that the crown is in no cafe obliged to allege a prefentation. And the drawer of this declaration feemed to be aware of this, and has therefore fet forth the affair of the *commendam*, in hopes that may amount to an allegation of a prefentation. But that I hope will not do when it is confidered,

2. What fort of a *commendam* this is. And I infift it is a *commendam retinere*. The words of it are fo, that he thereby became *capax retinere*. This point I believe will not be difputed, and therefore I fhall pafs to the third. [1009]

3. That though a *commendam capere* does amount to a prefentation, yet a *commendam retinere* does not. Lord *Hob.* 143. in the great cafe of *Colt* v. *Glover*, will not even allow fuch an inftrument as this to be called a *commendam*; he fays it is only a faculty of retention and continuation of the benefice in the fame perfon and ftate wherein in it was, notwithftanding fomething intervening, as a bifhoprick, or the like, which without fuch a faculty would have avoided it: fo a *commendam* it is not, for my own benefice cannot be commended unto me; and the difference (*Hob.* 156.) between *retinere* and *capere* is no lefs than holding what is already my own, and taking that which is another man's. One of the points determined in the cafe of the *King* againft Dr. *Birch* was, that the *commendam* or difpenfation to hold the living for fome time, was not a prefentation; but that the crown fhould have its prerogative turn after the difpenfation expired. There is a great deal of difference between a prefentation, which muft be followed by inftitution and induction, and L. Raym. 23.

this

this dispensation, which supposes the church to be full already, and prevents its becoming void. Since therefore here is an attempt to shew how the crown became seised, and that allegation does not shew a possession, which can only be shewn by a presentation; there is no room to say, that this dispensation is sufficient.

4. The last point to be considered is, whether the taking issue on the seisin alleged in the count, and the verdict finding the Queen to have been so seised, does not cure the defect in the count in not alleging a presentation. And I shall contend it does not. I admit there have been cases, where a verdict has cured the want of a material averment. But then those cases have been where the issue joined was such as necessarily required the proof of that fact, and without which proof the jury could not have given the verdict. And that I take to be the foundation of this healing quality in a verdict.

Now to consider the case as it stands upon these pleadings. Two things were necessary to be alleged. 1. The seisin. And 2. The presentation: the first to shew the right, and the second the exercise of it. Had both these been alleged, the defendant would have had an opportunity of traversing either; and if he could have over-thrown either, the crown could never have re-
[1010] covered. Which-soever of these he had traversed, the proof must necessarily have been confined to that: and in a traverse of the seisin there would be no occasion to prove a presentation; because a man may be seised in fee of an advowson, though he never presented: and in a traverse of the presentation he need only confine his evidence to that matter of fact, without meddling with the seisin. In *Skin.* 675. Lord *Holt* says, the presentment is the proper matter to be traversed. But if this count is good, it enables the owner of the fee to recover in *quare impedit*, though there never was that possession which is necessary in a possessory action: for he will allege no presentation, to give the other an opportunity of denying it; but count only on the seisin, and drive him to take issue on that only; and then set up the verdict, to cure the actual want of the other. If the court keeps to the effect of a verdict, as I contend, there will then be some rule to go by; but if they once leap over those bounds, it will be hard to know where to stop. In *Salk.* 662. the plaintiff declared, that the defendant kept a bull, that used to run at men; but did not say *scienter*: and held naught after a verdict, for the action lies not, unless the master knows of this quality; and we cannot intend it was proved at the trial, for the plaintiff need not prove more than is laid in his declaration. This case proves, that they go upon the presumption of its being proved at the trial,

trial, where it is neceſſary ſo to be. 1 *Sid.* 184. treſpaſs for taking a hook: the defendant pleaded, he had a way to a wood over the land of the plaintiff, and was ſtopt by the plaintiff, who ſtruck at him with the hook, upon which he took it out of his hand: they went to iſſue on the right to the way, and found for the plaintiff: and moved in arreſt of judgment, that the plaintiff had not ſhewn the hook to have been in his poſſeſſion: and held by all the court, that if the trial had been on Not guilty, it would not have been helped, but here the defendant had by his plea ſhewn it to have been in the plaintiff's hand, and that he took it out. There is nothing of that nature in our plea, or that admits a preſentation by the crown. The iſſue therefore to be tried not requiring the proof of a preſentation, or its being admitted from the nature of the iſſue; I apprehend the want of ſuch an allegation is not cured by the verdict, but the declaration remains ſtill liable to that objection.

Lord *Hardwicke* delivered the reſolution of the court.

In this caſe there are three things conſiderable. 1. Whether it be neceſſary to allege a preſentation. 2. If neceſſary, then whether the *commendam* amounts to a preſentation, or excuſes the want of alleging one. And 3. Whether the verdict, which finds that the Queen was ſeiſed in fee, *ut de uno groſſo*, cures it.

Upon the two firſt points the opinion of the court has been already intimated, and there is no occaſion to ſay much upon them; only as it will be a proper introduction to the laſt. And we are all of opinion, that a preſentation was neceſſary to be alleged, and the *commendam* will not ſerve the purpoſe; and therefore on thoſe two points the plaintiff in error is right: but upon the third point we are of opinion with the defendant in error, that the verdict has ſet all right. [1011] 5 Com. Dig. Pleader. (3 I. 5.) 73.

The authorities on which we found our opinion on the firſt point were cited at the bar out of *F. N. B.* the rules whereof are the foundation of what is delivered in *Hobart* and *Vaughan*, who are the authors that have entred the deepeſt into, and treat beſt of, this ſubject. By them it appears, that as to this point there is no difference between the crown and a ſubject. A preſentation makes a fee, and proves a fee. To which I may add, that the law requires a plaintiff to ſhew, *coment* his ſeiſin aroſe; this being incorporeal, and not to be executed by livery. Now a preſentation makes a ſeiſin, and ſhews at the ſame time how it aroſe, and is the proper evidence of it. 5 *Co.* 98. *a.* a preſentation by the grantee of the next avoidance avails the grantor, and ſo is the caſe put of a ſeiſin of ſervices by a guardian or leſſee for

years. And it appears by the divisions of *Rolle's* titles, 2 *Abr.* 376, 378. that he thought so, for he speaks of shewing a seisin by presentation. *Fitz. Quare Impedit* 171.

As to the second point it may be admitted without prejudice to this point, that a *commendam capere* amounts to a presentation; but this certainly is not such a *commendam*, and so the defendant's counsel seemed to admit.

The third and last point is upon the verdict, and that we all think has cured the not actually alleging a presentation.

2 Burr. 1161. 5 Com. Dig. Pleader. (C. 87.) 378.

The common learning is, that it cures a title defectively set forth, but not a defective title. The words of the statute 16 & 17 *Car.* 2. *c.* 8. are very strong, and on that act an actual amendment is never made, but the benefit of the act is attained by our over-looking the exception.

I admit, that if a title is not implicitly found, it will be ill; but we think the title being found, which is a seisin; it necessarily follows, that a presentation must have been proved. 3 *Mod.* 162. The crown can only gain a seisin, as part of the ancient [1012] patrimony of the crown, or by a title from a subject. If the first, (which is rather to be presumed) then it must have been presented to before, or not. If presented to before, it is an actual seisin: the crown cannot be usurped upon, or put to its writ of right. 6 *Co.* 49. 2 *Inst.* 357. 1 *Co. Litt.* 344. *b.* *Cro. Jac.* 123. If there had been no presentation before, there must have been a special case to have been counted on. If the crown derives its title from a subject, it must be either by usurpation, grant, or office. If by usurpation, that must have been by a presentation. If by grant, a presentation must have been shewn, or a special case to excuse it. If proof had been given of presenting the last turn, that would have been an actual seisin. If not the last turn, then there was a usurpation, and the crown could gain no seisin, and the verdict cannot be true. For at common law a usurpation was rather stronger than a disseisin on land; for the usurper gained the possession, and left the rightful patron a mere right: and in such case nothing could pass to the crown, either by grant or office, but a right to maintain a writ of right, and not a *quare impedit.* An advowson appendant may be gained by seisin of the manor; but an advowson in gross cannot be acquired, without that which is an actual seisin. 10 *H.* 7. 27. *pl.* 7. 1 *Leon.* 154. 1 *Mod.* 281.

The use of these cases is, that if the presentment admits the seisin in gross; it is to a common intent included in the verdict, and

and this will only be a title defectively set forth; in which case according to *Hale*, 1 *Vent.* 122. the court will intend any thing to make it good. Here needs no intendment, for it was of necessity to have been proved. 1 *Sid.* 218. is a very strong case for this purpose.

If the true ground be, that it is only to shew, *coment* he was seised; it is one of the least defects a verdict can cure, because the existence of the thing is admitted, and the doubt only upon the manner of it. An heir must shew *coment* heir; but if he does not, and the other does not demur, the finding him heir will cure it. 1 *Lev.* 190.

We are all therefore of opinion, that though this would have been ill on demurrer, yet it is now cured by the verdict; and therefore the judgment must be affirmed.

Easter Term

8 Georgii 2 Regis. In B. R.

Philip *Lord* Hardwicke, *Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq*;

John Willes, *Esq*; *Attorney General.*
Dudley Ryder, *Esq*; *Solicitor General.*

Pew *verf.* Crefwell et al' Churchwardens of St. Mary Rotherhithe.

Bounds of the church-yard not triable in the fpiritual court. 1 L. Raym. 212.

PEW was libelled againft in the fpiritual court for a nuifance and incroachment on the church-yard; to which he pleaded, that he was the owner of four tenements, which formerly ftood on the ground in queftion, and that his prefent building was upon the old foundation, and did not project further. And this not being a matter properly triable there, a prohibition was granted; for though interrupting the ufe of a church-yard, as a church-yard, is properly cognizable in the ecclefiaftical court; yet the bounds of it, which is matter of freehold, ought not to be determined there (1). *Vide F. N. B.* 51. *A.* 2 *Roll. Abr.* 137. *pl.* 4. 1 *Roll. Rep.* 12. *Mo.* 413. 1 *Sid. Butler* v. *Yelman.*

(1) *Hilliard* v. *Jefferfon*, 1 *Ld. Raym.* 212. In *Bifhop of St. David's* v. ——, *ib.* 443. *Vide* alfo *Witcher* v. *Cheflam*, 1 *Wilf.* 17. 6 *Com. Dig.* Prohibition. (F. 2.) 111.

Dominus Rex *verf.* Easman.

AN order was made at the sessions, for discharging an apprentice; the master having used him unkindly, and refusing to provide for and entertain him. *Et per curiam*, This order must be quashed, not for want of an original jurisdiction in the sessions, which has been often allowed them; but because it does not appear the master was present or summoned, which it is plain the act intended he should be. Besides, there is another fault, which is, that the reason given in the order is not a ground for their proceedings; for there is a power to oblige the master to receive and entertain him, and using him unkindly is too loose. *Vide Trin.* 12 *Geo.* 1. *Rex* v. *Davie*, *ante* 704.

Apprentice cannot be discharged without appearance or summons of the master. Ann. Rep. 101. S. C.

[1014]

Using him unkindly is not sufficient.

Between the Parishes of Whaddington *and* Tedford in Lincolnshire.

ON a special order of sessions, it was stated, that the *pauper* contracted for the purchase of a house in *Whaddington* for 39 *l.* and paid 9 *l.* out of his own money, and the remaining 30 *l.* was by his order paid by another person, to whom the premisses were mortgaged for it: that the *pauper* had lived upon it four years, when the mortgage was foreclosed, and he turned out: and the question being, whether he had gained a settlement hereby, the sessions adjudge that this was a fraudulent purchase, and consequently no settlement gained thereby.

Though part of the purchase money is advanced by another, yet if there is no fraud, a settlement may be gained on 9 *Geo.* 1. *c.* 7. Burr. Sett. Ca. 57. and Sess. Ca. Ed. 1750. vol. 2. p. 237. no. 164. S. C.

Sed per curiam, The order must be quashed: the purchase money by 9 *Geo.* 1. *c.* 7. need only be 30 *l.* and the advancing the money by another makes no alteration. And the fact being specially stated, we can judge as well as the sessions, whether it be fraudulent or not. The circumstance of his continuing four years ousts all presumption of fraud (1).

(1) *Vide* the distinction between a case where fraud is found generally, and where the facts are specially stated, and a conclusion of fraud is drawn from them by the justices, most clearly explained by Lord *Hardwicke* in this case. *Burr. S. C.* 60. *Rex* v. *Woodland*, 1 *Term Rep.* 261.

Between the Parifhes of St. Maurice *and* St. Mary Calender in Winchefter.

Executing office of conftable fettles certificate-man. Burr. Sett. Ca. 27. and Seff. Ca. Ed. 1750, vol. 1. No. 315. 2 Bott by Conft 285. pl. 296. S. C. and much fuller. Ante 411. 544.

UPON a fpecial order of feffions, it was held, that executing the office of conftable in the city at large, gave a certificate-man a fettlement in that parifh where he inhabited; though he was appointed by the corporation in general, and acted through all the parifhes in the city; for he executes an annual office in the parifh, which are the words of the ftatute.

[1015]

Jenkins *verf.* Bates.

Where error abates by the act of the party execution fhall go.

THE plaintiff in error married, whereby her writ abated; and this being by her own act, and not the act of God, the court gave leave to the defendant to take out execution, without giving time to the plaintiff to bring any writ of error *coram vobis* (1).

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(1) *Buller* v. *Luffitano de Pinna*, *ante* 880, S. P.

Bourn *verf.* Mattaire.

Replevin for 14 fkimmers and ladles, certain enough. Caf. temp. Hard. 119. S. C. much fuller Bull. L. N. P. 53. 4 Bac. Abr. 385. 5 Com. Dig. Pleader, (3 K. 10.) 1754.

IN replevin, it was held to be certain enough, being for 14 fkimmers and ladles, without faying how many of each (1).

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(1) *Kempfter* v. *Nelfon*, *Gilb. Rep. in B. R.* cited *Caf. temp. Hard.* 121. acc. The principle on which it was held good was that though fuch a declaration would be ill on demurrer, yet the pleadings had fupplied the defect, becaufe the avowant having avowed the taking, had thereby taken upon himfelf the knowledge of what the goods were. *Caf. temp. Hard.* 121. *Bull. L. N. P.* 53.

Dominus Rex *verf.* Francis et al'.

A taking in the prefence is a taking from the perfon and felony, but in fpecial verdicts it muft be exprefsly found that the party robbed was prefent at the taking up. Caf. temp. Hard. 113. Comyns 478. Doug. 412.

THE defendants were indicted at the affifes in *Somerfetfhire*, for that they felonioufly made an affault on *Samuel Cox* in the King's highway, and put him in fear, and 9 *l.* in money

from

from the person of *Cox* did take, steal, and carry away. Upon Not guilty pleaded by all the defendants, the jury find this special verdict:

That *Samuel Cox* travelling on horseback on the King's highway to *Somerton* fair, on a place called *King's down Hill* in the county of *Somerset*, saw all the prisoners in company together, one of whom was then lying on the ground: that *Cox* passed by them, and one of them (but which the jury do not know) called to *Cox*, and desired him to change half a crown, that they might give something to a poor *Scotchman* then lying on the ground, who was one of the prisoners. *Cox* came back, and putting his hand in his pocket to pull out his money in order to give them change, as they desired, he pulled out four moidores and a *Portugal* piece value 3 *l.* 12 *l.* and having the pieces of gold in his hand, *John Francis*, one of the prisoners, gently struck *Cox*'s hand, in which he held the gold, by means whereof the gold fell on the ground: that thereupon *Cox* got off from his horse, and said to the prisoners, that he would not lose his money so; and the said *Cox* then and there offering to take up the pieces of gold, which were then upon the ground, and in *Cox*'s presence; the prisoners then and there swore, that if he touched the pieces of gold, they would knock his brains out; whereby he was then and there put in bodily fear of his life, and then and there desisted from taking up the pieces of gold. That the prisoners then and there immediately took up the gold, and got on their horses, and rode off with the gold; that *Cox* immediately thereupon pursued them, and rode after them for about half a mile; [1016]
and then the prisoners struck him and his horse, and swore that if he pursued them any farther, they would kill him; by reason of which menace he was afraid to continue his pursuit any farther; but whether upon the whole matter the prisoners are guilty of the felony and robbery charged on them, the jury doubt, and pray the advice of the court. *Et si, &c.*

This special verdict and the prisoners were removed into the King's Bench, where it was twice argued at the bar. And upon the first argument the only question was, whether a taking in the presence be in point of law a taking from the person, and it was unanimously determined that it was.

But then a doubt arose (which occasioned the second argument) whether it was sufficiently found to have been taken in the presence of *Cox*, it not being said so in express words: and after it had been argued in *B. R.* upon this point, it was ordered to be argued again at *Serjeants'-Inn-Hall* before all the Judges of *England*, where I attended on behalf of the prisoners

 against

against Mr. *Hussey*; who argued for the King, and insisted that here was sufficient found to constitute the crime of robbery, it being found that *Cox* was put in fear, and that the money was in his possession, till one of the prisoners struck it out of his hand; and the finding that the prisoners *immediately* took it up, excludes all possibility of *mesne* acts, such as *Cox*'s going away before they took it up; and that to excuse them it should have been expresly found, that *Cox* did go away before the money was taken up.

Strange contra, I shall not dispute but that a taking in the presence is a taking from the person, and consequently a robbery, where it is accompanied with the other necessary circumstances. But the question here is, whether this is found to be a taking in the presence of *Cox*. It is unnecessary to cite cases, to prove that on these verdicts nothing is to be intended: Judges have always guarded against that with great caution. It has gone so far, that where it stands indifferent which way the fact is to be taken, the turn of the scale is never given against the prisoner. And therefore in *Keat*'s case, 5 *Mod.* 287. *Skin.* 666. where on an indictment for killing his gardener the jury found that the master struck the gardener, and the gardener struck the master, and the master gave him a mortal wound; the Judges would not determine that the master struck first, so as to make it murder: and yet from the manner of finding any one would be led to collect, that the first blow was given by the master. It must be agreed that here is no finding in express words, that the taking [1017] was in his presence. But it is contended that here is that which is tantamount. Now I insist, that how great room soever here is to infer the presence of *Cox*; yet it not being found as a fact, that he was present at the taking up the money, and that being a circumstance material to constitute it a robbery, the prisoners must be discharged.

In the acts found there must necessarily be a priority and posteriority in time. *Cox* got off from his horse, offered to take up the money, was threatened and put in fear, and then and there desisted from taking up the gold. The manner of this desisting is not found, and therefore may naturally be inferred to be by going away.

The next fact found is, that the prisoners then and there immediately took up the gold, got upon their horses, and rode off. *Immediately* must mean, that the next thing done after *Cox*'s desisting, was the prisoner's taking up the money, but this does not determine how soon that was after the desisting. Consider it as opposed to the word *mediately*, and it will shew this to be a right

right construction. It is not found when *Cox* got upon his horse, or whether he had his horse in his hand, or it was standing at a distance. It is said he *immediately* pursued them, by riding after them; this shews that *immediately* does not in this verdict mean the same as *eo instante*, for *Cox* must have had time to mount, and observe which way they went, before he could pursue. The *Latin* word *immediate* is not only rendered *immediately*, but also *forthwith*, and *by and by*, and in writs that are returnable *immediate* it means as soon as may conveniently be, and without delay. If it stood upon the words *then and there* only, the legal operation of them is always taken to denote the same day and place, for a *venue*; so that to make this good the whole reliance must be upon the word *immediately*. It is not found, that *Cox* so much as knew they had taken up the money, for the words *that he would not lose his money so*, refer to the striking it gently out of his hand, whereby it fell to the ground. When he remounted and pursued, he did not declare it was because he would not lose his money, but he might pursue them on account of the assault in striking his hand. All the authors who hold taking in the presence to be a taking from the person, speak of it as a taking openly. And before his face. *Stanf.* 27. *H. P. C.* 73. 3 *Inst.* 69. *Hawk.* 96. *Sti.* 156. Now no body can say, but that on this finding it is impossible the money might not be taken up in the presence of *Cox*; and if there is but a bare possibility of that, his presence is not to be inferred. In the case of Mr. *Huggins* it was attempted to infer his consent to the duress of *Arne* from circumstances found in the verdict; but the court said, though there was ever so strong an evidence of consent, yet consent was a fact, and they could not judge on evidence of a fact. Whether this was taken up in *Cox*'s presence is a fact, and I admit there is strong presumptions of it, and that a man must be acquainted with the laudable exactness required in these proceedings, to start such an objection on this verdict. But to one acquainted with the nature of them, and the aversion Judges have always shewn to infer facts from evidence, I apprehend the objection must have great weight.

Ante 882.

Supposing it therefore uncertain, whether this taking was in the presence of *Cox* or not; I apprehend there can be no doubt, but that the court must give judgment for the prisoners. That is, they must give such a judgment as the law would warrant, if it had been found, that the taking was not in *Cox*'s presence: and that is, that the prisoners are Not guilty on this indictment.

It would have been a circumstance very material in the case of *Plummer* (*Kelyng* 111.) to have found that the fuzee was discharged *against* the King's officers; but the jury were silent as to

to that, and the court said they could not take the fact to be so on bare evidence of the fact, but proceeded to give judgment, as if the fuzee had not been discharged against the King's officers, without sending it back to the jury to find it positively one way or the other. So in the case of *Messenger et al'* (*Kelyng* 79.) who were indicted for high treason in assembling and pulling down bawdy-houses, the verdict was silent as to *Green* and *Bedell*, whether they were aiding and assisting; and this, says *Kelyng*, being a matter of fact, which ought to be expresly found by the jury, and not left to the court upon any colourable implication from their being present, they two were discharged, without sending it back to the jury for their further opinion as to the fact. In *Kelyng* 66. on a special verdict it was found, that *Thompson* and his wife were fighting, and *Dawes* endeavouring to part them was killed by *Thompson*; and it not being found that *Thompson* knew *Dawes* only intended to part them, it was held manslaughter, without sending it back to the jury to be certified of his knowledge. *Keat*'s case before cited was so incertain, that the court could not determine who struck first; and yet *Holt* Chief Justice was so averse to a *venire facias de novo*, that he took exception to the indictment, and it was quashed. And after this, was the case of *Plummer*, where *Holt* could not find a flaw in the indictment, and so the verdict stood. The case of Mr. *Huggins* is not a direct authority, because the Judges said there was no incertainty: but it plainly appeared, what their judgment would have been, if they had thought the verdict incertain. In that case it was found, that *Huggins* was once present at the room, and saw *Arne* under the duress *et adtunc et ibidem seipsum avertit*, *Anglice*
[1019] *turned away*, and that *Barnes*, *eodem tempore quo præd' J. Huggins seipsum sic ut præfertur avertebat*, locked the door. Now *eodem tempore* is stronger than *immediate*, and yet in that case the court would not consider this as a shutting up *Arne* with the consent of *Huggins*, there being a possibility that the door might be locked by *Barnes*, and he not know it. It was there found, that he saw him *sub duritia imprisonamenti illius*; and yet the court would not infer his knowledge of the circumstances from thence. In the present case it is considerable, that here is a possibility, the prisoners may be innocent of a robbery. The court are not to judge on probabilities, but positive facts. It is not positively found, that the taking up was in *Cox*'s presence. And therefore I hope the prisoners shall be discharged.

After this argument the Judges took time to consider it. And this term the Chief Justice declared, that all the Judges, except *Carter*, *Comyns* and *Thompson*, who only doubted, were of opinion, that the fact of *Cox*'s presence at the taking was not sufficiently found, though there seems to have been evidence enough

to warrant such a finding. That the whole rested on the word *immediately*, *then and there* serving only for a *venue*, and *immediately* was a word too loose and uncertain. In *Stephens's Thesaurus* it is rendered *cito* and *celeriter*; in *Cowper*, *by and by*; and in other dictionaries *sine dilatione* and *presently*. In legal proceedings it does not exclude all *mesne* times and *mesne* acts. In *Oneby*'s verdict it is used five times to different purposes. In *Mawgridge*'s twice. On the statute 27 *Eliz. c.* 13. § 11. the notice for hue and cry must be in convenient time; and yet on declaring you aver that it was *immediate*, which is supported by proof of a convenient time. The cases cited shew, how nice the Judges have always been; and therefore, as here wants one necessary ingredient to make it a robbery, the prisoners must be discharged from this indictment.

2 Lev. 75. *Pybus* v. *Milford*.

However we all think this a grand larceny, and therefore cannot discharge their persons. But as we cannot give judgment for a larceny, there must be a new indictment; for we are confined to the doubt of the jury, whether this be a taking from the person of *Cox*.

When on arguing a special verdict for a capital offence it appears the defendants are guilty of a less crime, the court will not discharge them.

They must be remanded to *Somersetshire*. We discharged *Burridge* the other day, because there no species of felony was found.

Trinity Term

8 Georgii 2 Regis. In B. R.

Philip *Lord* Hardwicke, *Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq*;

John Willes, *Esq*; *Attorney General.*
Dudley Ryder, *Esq*; *Solicitor General.*

Maundy *verſ.* Maundy.

By a deviſe of ground-rents on leaſes for years the reverſion paſſes (1). Fitz. 70. 288. S. C. in C. B. Caſ. temp. Hard. 142. 2 Barnard. K. B. 202. S. C.

ON a ſpecial verdict in ejectment for houſes in *Red-Lion-Square*, it was found, that *Ventris Maundy* being ſeiſed of the reverſion in fee of the houſes, which were of the value of 260*l. per annum*, but then let out on leaſe for ſixty years at 22*l. per annum* called a ground rent, and having ſeveral ſons and daughters, made his will in *April* 1696, in this manner, "In "reſpect to my wordly eſtate wherewith it hath pleaſed God to "bleſs me, I diſpoſe of it as follows. To my ſon *Daniel* I "give 4*l. per annum* of my ground rent:" and in like manner he parcels out the whole 22*l.* to his children (except the eldeſt) "his, her, and their heirs and aſſigns for ever; but as to "*Ventris*, my eldeſt and undutiful ſon, I give him, in hopes "he

(1) So a bequeſt of "*leaſehold ground rents in S.*" paſſes the reverſionary leaſehold intereſt as well as the reſerved rent. *Kaye* v. *Laxon*, 1 *Bro. Chan. Ca.* 76.

'he may reform, 5*l.* *per annum* due on blank tickets in the 'million lottery. And if any of my other children die, their 'legacy to go to the furvivor, my faid undutiful fon excepted, 'who is to have no fhare or part thereof, nor no more fhare 'or portion than I have before given him."

The building leafes being expired, the heir of *Ventris* the eldeft fon brought an ejectment, infifting that the reverfion was undifpofed of; and that however ftrong the intention to difinherit the eldeft fon appeared, yet if it is undifpofed of, he muft have it. But upon argument in *C. B.* judgment was given againft him in favour of the devifees, and now that judgment was affirmed in *B. R.* [1021]

1. Becaufe the intention to pafs all his eftate was plain from the introductory part, where he declares his will was in refpect of all his worldly eftate, and that part where he fays what his eldeft fon fhall have, and no more (1).

2. The limitation is to the younger children and their heirs; which cannot take effect, if their intereft is only during the continuance of the rent. And nothing is more common, than for people to fpeak of their ground rents, when they mean the houfes and lands out of which they iffue.

3. The cafe of *Kerry* v. *Dethick* in *Mo.* 640. is exprefs in point; and though in that cafe it is faid, the defendant was advifed to bring a writ of error, yet that does not impeach its authority.

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(1) *Ibbetfon* v. *Beckwith*, *Caf. temp. Talb.* 157. 160. *Scott* v. *Alberry*, *Com. Rep.* 337. *Denn* v. *Gafkin*, *Cowp.* 657. *Right* v. *Sidebotham*, *Doug.* 730. *Goodright* v. *Stocker*, 5 *Term Rep.* 13. Where it is laid down that though an introductory claufe, "(*that his will is in refpect to his wordly eftate*)" would have fome effect in the conftruction of fubfequent devifes, they will not of themfelves carry a fee. See alfo 3 *Com. Dig.* tit. *Devife*, (N. 2.) 414. 8 *Vin. Abr.* tit. *Devife*, (T. a.) 227.

Valentine *verſ.* Fawcett.

Writ of inquiry awarded to ſupply non-aſſeſſment of damages. Ann. 138. S. C.

THE defendant was an overſeer of the poor, and was ſued for what he did in execution of his office; and on the trial a verdict was given for him, and the ſtatute 43 *Eliz.* *c.* 2. ſaying, that he ſhall recover treble damages by reaſon of his wrongful vexation, with his coſts, to be aſſeſſed by the ſame jury, or writ to inquire of the damages, as the ſame ſhall require; he now moved for a writ of inquiry: which was oppoſed, for that it could only iſſue when the plaintiff was nonſuit, after which the ſame jury could not go on; whereas the plaintiff appeared, and a verdict was given.

But the court held the writ of inquiry ſhould iſſue. *Vide* 11 *Co.* *Cheney's* caſe, *Carth.* 362. *Salk.* 205. 5 *Mod.* 118. *Yelv.* 176.

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(1) *Freeman* v. *Lady Archer*, 2 *Black.* 763. *Dewell* v. *Marſhall*, *ib.* 921. *Et vide Kynaſton* v. *Mayor of Shrewſbury*, *poſt.* 1052. 5 *Com.* *Dig.* *Pleader*, (Z. 1.) 558.

Michaelmas Term

9 Georgii 2. Regis. In B. R.

Philip *Lord* Hardwicke, *Chief Justice.*
Sir Francis Page, *Knt.* }
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq*; }
John Willes, *Esq*; *Attorney General.*
Dudley Ryder, *Esq; Solicitor General.*

Marsham *vers.* Gibbs.

TO Not guilty in *assumpsit* the plaintiff demurred. *Et per curiam*, Though it would be good after a verdict (1), yet it is ill on demurrer, and the plaintiff had judgment. 1 *Lev.* 142. (2).

Not guilty in *assumpsit*, ill on demurrer. Cas. temp. Hard. 173. S. C.

(1) *Vide Robinson* v. *Green*, *ante* 574.

(2) *Noy's Rep.* 56. *Brownl.* 8. *Al.* 77. *Com. Rep.* 10. *Comb.* 379, 380. *Carth.* 371. *Ld. Raym.* 90. *Cro. El.* 470. *pl.* 29. *Sid.* 236. *pl.* 3. 2 *Barnes* 252, 253. note 2d. edition. *Vide* also *Palm.* 393. *Bend.* 154.

Between the Parishes of Seaford *and* Castle Church.

ON a special order of sessions, it was stated, that the *pauper* was hired for a year, which he served till the last twelve days, when he went away without the master's leave, and staid till after the year was up, when he returned for his cloaths, and was

Going away twelve days before the end of the year prevents a settlement. Burr. Sett. Ca. 68. S. C.

was paid the whole year's wages. And on consideration, that if they once allowed this absence for twelve days at the end of the year (which differed from an absence in the middle of the year, which was purged by taking him again) they should not know where to stop; it was determined that he gained no settlement (1).

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(1) *Pawlet* v. *Birnbam*, 2 *Bott by Const* 494. *pl.* 434. *Sheen* v. *Godalming*, *ib.* 497. *pl.* 437. 2 *Sess. Ca.* 116. *pl.* 111. *Rex* v. *North Basham*, *ib.* 527. *pl.* 460. S. P. and see *Rex* v. *Caverswall*, *Burr. S. C.* 461. *Rex* v. *Grantham*, 3 *Term Rep.* 754. *Rex* v. *Clayhydon*, 4 *Term Rep.* 100. But there may be an absence for the last days of the year, which will be no dissolution of the contract, and therefore the servant will gain a settlement. *Vide Rex* v. *Islip*, *ante* 423. *Rex* v. *Preston*, 2 *Bott* 497. *pl.* 438. *Rex* v. *Goodnestone*, *Burr. S. C.* 251. *post.* 1222. *Rex* v. *Nether Heyford*, *ib.* 479. *Rex* v. *Christchurch*, *ib.* 494. *Rex* v. *Froome Selwood*, *ib.* 565. *Rex* v. *Maddington*, *ib.* 675. *Rex* v. *Potter Heigham*, *ib.* 690. *Rex* v. *Richmond*, *ib.* 740. *Rex* v. *St. Bartholomew Cornhill*, *Cald.* 48. *Rex* v. *St. Philip in Birmingham*, 2 *Term Rep.* 624. *Rex* v. *St. Andrew's Holborn*, *ib.* 627. *Rex* v. *Sulgrave*, 2 *Term Rep.* 376.

[1023] Dominus Rex *vers.* Episcopum Litchfield and Coventry.

The bishop may take time to inquire into the character of one elected schoolmaster before he licences him. 2 Barn. B. R. 365. 428. And. 367. S. C. Argument on motion to supersede mandamus. 2 Kely. 287. Before the delegates. Com. 448. and vide 3 Burn's Eccl. Law 313.

A *Mandamus* issued to the bishop, to grant a licence to *Rushworth* a clergyman, who was nominated usher of a free grammar school within his diocese; to which he returned, that a *caveat* had been entered by some of the principal inhabitants of the place, with articles annexed, accusing him of drinking, incontinency, and neglect of preaching and reading prayers; and that the *caveat* being warned, he was proceeding to inquire into the truth of these things, when the *mandamus* came, and therefore he had suspended the licensing him.

And without entering much into the arguments, whether the bishop had the power of licensing; the court held, that the return should be allowed as a temporary excuse. For though the act of uniformity obliges them only to assent to and subscribe the declaration, yet it adds *according to the laws and statutes of this realm*, which presupposes some necessary qualifications, which it is reasonable should be examined into.

Goodtitle *verſ.* Thruſtout.

IN ejectment on demiſe of Lord *Gower*, it was held no cauſe of * challenge, that a knight was not returned on the jury, according to the caſe of *Holbourn* v. *Kingſton* in the Houſe of Lords (1).

Though the leſſor is a Peer there need be no knight returned on the jury. MSS. Cited And. 133. 3 Bac. Abr. 252.

*N. B. This challenge is taken away by 24 Geo. 2. c. 18. note to 2d. edition.

(1) The reaſon for this determination was, that Lord *Gower* was not a party to the record. MSS. Note the challenge contained an averment, that the ejectment was brought to try Lord *Gower*'s title, and purſued at his coſts. MSS.

Dominus Rex *verſ.* Inhabitantes Bovindon in Hertfordſhire.

IT was held, that payment to the poor does not give a ſettlement, unleſs the party was rated: for the rating is the act of the pariſh, and not the other. And the ſettlement ariſes from the pariſh's giving that evidence of their being ſatisfied of his ability (1).

Paying gives no ſettlement if not rated. Burr. Sett. Ca. 72. S. C. by the name of *Rex* v. *Sarrat*.

(1) *Rex* v. *Lancaſter*, 19 *Vin.* 384. *Selongtongham* v. *Worpleſdon*, *Fol.* 128. *Rex* v. *Bramſhaw*, *Burr. S. C.* 98. *Rex* v. *Lower Walton*, *ib.* 100. *Rex* v. *Stanlake*, *ib.* 627. *Rex* v. *Carſhalton*, *ib.* 809. *Rex* v. *St. Cuthbert*, *ib.* 817. *Rex* v. *St. John's Southwark*, *Cald.* 62. S. P. See all the caſes collected upon this ſubject, 2 *Bott by Conſt* from 226 to 280.

Franklyn *verſ.* *Reeve*.

ERROR of a judgment *e C. B,* in treſpaſs, where after recital of the writ, the plaintiff counted for taking and carrying away ſeveral loads of dung and ſoil, without ſaying *ipſius querentis*. And after verdict, that was objected, and held that this was ſuch a defect of title in the count, as could not be aided by the verdict (1); which aids not a defective title, but only a title defectively ſet forth.

The recital of the writ may aid a defect in the count. Caſ. temp. Hard. 118. Ante 1011.

(1) *Vide Yelv.* 36. 1 *Brownl.* 192. *Cro. Jac.* 46. *T. Raym.* 395. 3 *Keb.* 524. 2 *Lev.* 156. 3 *Bulſt.* 303. 1 *Ld. Raym.* 239. 2 *Ld. Raym.* 890. acc.

But

But though the count was held ill, yet the court thought it might be made good by the recital of the writ, which had ſhewn them to be the dung and ſoil of the plaintiff, and was to be taken as part of the declaration, according to the caſes in *Cro. Jac.* 536. 1 *Sid.* 150. 187. 1 *Keb.* 699. 727. *Lutw.* 1509. 1 *Mod.* 219. And though it was agreed there was no original, (which otherwiſe they would have ſent for up by *certiorari*) yet as the want of that was aided by the verdict, the judgment ſhould be affirmed (2). [1 *Com. Dig. Amendment*, (D. 6.) 452.]

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(2) According to the report *Caſ. temp. Hard.* the court doubted how far the count could be helped by the recital of the writ therein, until they had the original itſelf brought before them by *certiorari*, and they awarded one to remove it. But as the preſent report is two terms poſterior to that one, this ſeems to have been the final opinion of the court after there had been a return of no original. *Vide Goodright* v. *Hodgſon*, *Andr.* 282. 5 *Com. Dig. Pleader*, (C. 12.) 326. (C. 86.) 378.

Dod *verſ.* Saxby.

Where there are two executions the landlord cannot have a year's rent on each.

AFTER the landlord had had a year's rent paid out of the execution money according to 8 *Ann. c.* 17. there came in another execution; and the ſheriff refuſing to levy him another year's rent, he moved the court for a rule; but was denied, for the intent of the act was only to continue a lien as to one year, and to puniſh him for his *laches*, if he let more run in arrear. If the landlord had any thing to ſupport his demand, he might bring his action againſt the ſheriff (1).

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(1) On a rule to ſhew cauſe the caſe appeared to be, that two executions were in the ſheriff's office, under which he levied and paid *Dod* the landlord a year's rent, and alſo the whole of the money on the firſt execution, and part on the ſecond, after which *Dod* obtained the rule for another year's rent, and thereupon the court diſcharged the rule, for *per cur'* when the firſt execution was levied. Plaintiff accepted a year's rent, and now the ſheriff has paid away the money levied, he would have another, which is unreaſonable; if he was entitled to it, he ſhould have inſiſted upon it then; as it is, the queſtion is too difficult to be determined on motion, if the ſheriff has done the landlord wrong, he may bring his action. MSS.

Tipping *verſ.* Smith.

I award was made (reciting that the defendant had beat the plaintiff) whereby it was awarded, that the defendant give ſecurity to pay the plaintiff an annual ſum for and that all manner of proceedings (if any) depending at ould be no farther proſecuted. And upon demurrer this eld ill, being incertain, not final or mutual. It was in-, becauſe it did not determine what ſort of ſecurity ſhould en: it was not final, it ſtaying only proceedings then de-ig (if any); ſo that if the plaintiff had brought no ſuit, he liberty ſo to do, or even to diſcontinue what was brought, ing new ones. And it was not mutual, there being no re- or any thing awarded to be done by the plaintiff. So the lant had judgment.

Award held ill for incertainty, and not being final or mutual. 1 Burr. 274.

Knott *verſ.* Long. [1025]

I award that the defendant ſhould pay what coſts two perſons named in the award (who were not officers of any ſhould appoint for coſts (1); provided they are ſuch as a in Chancery would allow; was held ill, for they can only te their authority in that inſtance to one who, the court ke notice, underſtands it better than themſelves (2). The lant had judgment on demurrer.

Award to pay coſts to be taxed by one not an officer for that purpoſe, is ill. Caſ. Temp. Hardw. 181. But ſee Barnes, 43.

The award was that the ant ſhould pay ſuch coſts attornies G. and W. ſhould aving regard to ſuch coſts atter in Chancery would between complainant and lant; the attornies did not coſts until after the time for making the award was d and the action brought coſts. The court held the ff precluded from recover-pon two grounds, one on account of the delegation of the authority, the other becauſe the coſts were not liquidated before the time for making the award expired, MSS. and ſee the report *Caſ. Temp. Hardw.* to the ſame effect.

(2) *Vide Winter* v. *Garlick*, *Salk.* 75. 6 *Mod.* 195. *S. C.* *Stephenſon* v. *Browning*, *Barnes*, 50. *Dudley* v. *Nettlefold*, *ante* 737. *Philips* v. *Knightley*, *ante* 903.

Hilary Term

9 Georgii 2 Regis. In B. R.

Philip *Lord* Hardwicke, *Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq*;

John Willes, *Esq*; *Attorney General.*

Dudley Ryder, *Esq*; *Solicitor General.*

Hopkins *verf.* Neal and Newman.

Prochein amy no witnefs. Ante 506 (1). Caf. Temp. Hardw. 202. S. C.

THE plaintiff fued as an infant by her father the *prochein amy*, for an affault and battery: and the father was refufed to be a witnefs by Lord *Hardwicke* at *Nifi prius* in *Middlefex*, he being liable to the cofts.

(1) See alfo *James* v. *Hatfield*, *acc. per Chapple* J. *B. R. M.* 1738, *ante* 548. *Millward* v. *Sterling*, 12 *Vin. Abr.* 8. *pl.* 21.

Dominus Rex *verf.* Pewtrefs et al'.

Cannot ftrike counts out of an indictment. Ann. 203. S. C.

AN affault was laid twenty-one different ways. And on motion to ftrike them out of the indictment, the court faid it could not be done, being the finding of the grand jury; but they thought

thought the clerks in the crown-office ought only to draw the indictments, and then the court could punish them for the vexation.

Cox *verſ.* Robinſon.

[1027]

Money brought in on pleading a tender cannot be taken out by the defendant tho' he has a verdict. Temp. Hardw. 206. S. C.

IN *aſſumpſit* the defendant pleaded a tender of four guineas, and brought the money into court: the plaintiff replied a ſubſequent demand and refuſal, which on iſſue joined was found for the defendant; who thereupon moved the court to have his four guineas again; which was refuſed, for it is admitted ſo much is due to the plaintiff: and it is the ſame as if the money had been brought in on the common rule to ſtrike it out of the declaration (1).

(1) *Lane* v. *Wilkinſon*, *Pract.* *Reg.* 250. *Caſ.* *Pract.* in *C.* *P.* 36. *S. C.* *Crockay* v. *Martin*, *Barnes* 281.

Wallis *verſ.* Smith.

12 Geo. 2. c. 29. Practice. Caſ. Temp. Hardw. 207. S. C. more full. R. M. 10 G. 2. Reg. 1.

PER curiam, Where common bail is filed by the plaintiff's attorney according to act of Parliament, that is not ſuch a general bringing the defendant into court as to warrant delivering a declaration by the by. And to prevent miſtakes, it would be proper to add to the bail-piece, that it was filed by the plaintiff purſuant to the act of Parliament.

Bulſtrode *verſ.* Gilburn.

The principal and not the deputy is intitled to fees new created after the deputation. Plaintiff having remedy upon a covenant to account cannot bring *aſſumpſit*, for money had and received (1). Bull. L. N. P. 131.

IN *aſſumpſit* for money had and received to the plaintiff's uſe. It appeared, that the plaintiff was prothonotary of the palace court, and the defendant his deputy; and that by articles it was agreed what the defendant was to have, and he covenanted to account for the reſt. Theſe articles were before the ſtatute 12 *Geo.* 1. *c.* 29. which requires affidavits to be made in order to hold to bail, and impowers the officer who iſſues the proceſs, or his deputy, to adminiſter the oath, and to take one ſhilling for ſo doing. The defendant from the making the act took the ſhillings, and paſſed ſeveral accounts with the plaintiff, who had

(1) *Vide* *Touſſaint* v. *Martinant*, 2 *Term* *Rep.* 100. 1 *Com.* *Dig.* Action upon *aſſumpſit*. (F. 1.) 207.

never infifted to have thofe fees brought to account. But having now difcovered that it was very advantageous, brought this action. And it was held by Lord *Hardwicke*, that though the defendant did the bufinefs, yet he ought to account with the plaintiff for the fee. For a deputy is intitled to no more than he ftipulates for; and if he undertakes to execute the office, any fubfequent addition to the duty of the office will not vary the contract, though it may be a reafon to come to a new one. But he thought the prefent action not maintainable, the plaintiff having a covenant under hand and feal, which gave him a remedy of an higher nature, and upon that point had the plaintiff called.

[1028] Then the plaintiff brought an action of covenant in *C. B.* which was tried before Chief Juftice *Reeve*: and he being of the fame opinion with the Chief Juftice of the King's Bench, the jury by his direction found for the plaintiff. And upon allowing the defendant what they thought reafonable for his trouble, which was 400 *l.* they found 3000 *l.* for the plaintiff.

Dominus Rex *verf.* Juftices of Peace of Middlefex.

Vagrant money ought to be raifed quarterly, but a previous prefentment of the grand jury is not neceffary.
2 Seff. Ca. p. 361. no. 195. S. C.
Vide 17 Geo. 2. c. 5. f. 33.

AN order was made at the quarter-feffions for raifing 800 *l.* to defray the expences of paffing vagrants. And the ftatute 12 *Ann. c.* 23. § 13. directing the fame to be raifed as money for county gaols or bridges is to be raifed; exception was taken, that there was no prefentment of the grand jury to warrant this order, and that is required with regard to gaols by 11 & 12 *W.* 3. *c.* 19. and as to bridges by 1 *Ann. c.* 18. *Sed per curiam,* The reafon why a prefentment was required in thofe cafes is, becaufe it is a matter arifing upon view; but what is neceffary for this purpofe cannot be viewed by a grand jury, and therefore this exception was over-ruled.

Order for raifing vagrant money fhould fpecify the time for which it is to be raifed, and they ought to be made quarterly or half yearly.
Ante 700.

But there was another exception for which the order was quafhed, *viz.* becaufe it was to raife fo large a fum, and not faid for what time: fo that it may happen, that a man newly come out of another county where he has contributed, may pay in this county for a time when he was no inhabitant nor had any property there: thefe orders ought to be quarterly or half-yearly at leaft, within the reafon of poor's rates, which are required to be monthly, left a man fhould pay for a time when he is not a parifhioner. For this fault the order was quafhed.

The Bank of England *verſ.* Morice.

THE plaintiffs declare againſt the defendant as executrix of *Humphrey Morice* her late huſband, in caſe, for money had and received by him to the uſe of the plaintiffs.

Where a bond is forfeited in the life-time of the teſtator, the penalty is the legal debt, and on the iſſue what is due muſt cover ſo much aſſets, but on a bond where the day of payment is not come, the aſſets only can be covered for the ſum in the condition. Where an executrix pleads the penalties of three bonds, and the jury by ſpecial verdict find aſſets in one entire ſum, if the court are of opinion that the penalties of two of the bonds are to be conſidered as the debt due, but that the third ſhall cover no more than the ſum really due upon it, they may deduct ſuch penalties and ſum due out of the aſſets found, and give judgment for the plaintiffs to recover the reſt. 2 Barn. B. R. 183. 374. Ann. 219. 4 Bro. Par. Caſ. 287. S. C.

The defendant pleaded a judgment, and ſeveral bonds, and articles entered into by Mr. *Morice*, particularly a bond to Sir *William Morice* in the penalty of 53,000 *l.* conditioned for the payment of 26,500 *l.* by inſtalments, all of which were paſt and paid at Mr. *Morice*'s death, except one of 5000 *l.* and another of 1500 *l.* the days of payment whereof were not come at the time of the plea: ſhe alſo pleaded a bond to *Thomas Wilſon* in 500 *l.* for the payment of 2,500 *l.* at a day before the death of Mr. *Morice*: and a like bond to *Duncan Campbel* in 3000 *l.* conditioned for the payment of 1500 *l.* at a day likewiſe paſt: and then concludes, that ſhe had not more than 1000 *l.* aſſets to anſwer the ſaid ſeveral ſums by the ſaid ſeveral bonds, articles, and judgment, due and payable. To which the plaintiffs replied, that on the day of exhibiting their bill ſhe had aſſets of her late huſband beyond what would pay and ſatisfy the ſaid ſeveral ſums by the ſaid bonds, articles and judgment due and payable, whereby ſhe could make ſatisfaction to the plaintiffs. [1029]

And iſſue being joined hereupon the jury find a ſpecial verdict. That *Humphry Morice* at his deceaſe was indebted to the plaintiffs in 28,993 *l.* 8 *s.* 1 *d.* that the aſſets come to the hands of the defendant on the day of exhibiting the plaintiff's bill were 41,152 *l.* 2 *s.* 5 *d.* that the money payable by the conditions of the ſaid three bonds, together with the penalties on all the other articles, and the judgment pleaded by her, amounted to 21,182 *l.* 10 *s.* which being deducted from the ſaid 41,152 *l.* 2 *s.* 5 *d.* there remained the ſum of 18,969 *l.* 12 *s.* 5 *d.* That ſhe had not aſſets to diſcharge the penalties of thoſe three bonds, nor were they diſcharged: and that if the penalties on thoſe three bonds were not charges on the aſſets, then they find for the plaintiffs, that ſhe had aſſets to ſatisfy them to the amount of 18,966 *l.* 12 *s.* 5 *d.* But if the penalties were charges upon the aſſets, then they find for the defendant.

This cause was argued several times. And this term the court delivered their opinions: which resolution, together with my argument for the plaintiffs, will be sufficient to give a view of what was insisted upon by both sides.

Strange pro quer' argued, That on this plea and replication the defendant can cover no more assets on account of the three bonds, than the sums mentioned in her plea to be due by the conditions; and that in order to intitle the plaintiffs to recover, it was not necessary to prove assets to the amount of the penal sums.

To shew this I shall consider, 1. In what manner she might have pleaded these bonds; and, 2. In what manner she has pleaded them.

[1030] As to the first, there are two ways of pleading: 1. As single bonds: 2. By setting out the conditions, and shewing what is due. The first method of pleading is what chiefly occurs upon the entries and reports: and I admit that if they had been so pleaded here, and she had made the same conclusion, that she had not assets *ultra* what was due and payable upon the bonds, whereon issue had been joined; it must have been necessary to over-reach the penalties, for the court could not have taken notice of them as penalties, but as subsisting debts. The consequence of this sort of pleading is to drive the creditor into equity, in order to discover what is the honest debt, and prevent the executor from covering assets for more. This proved a great grievance, and therefore the courts of law endeavoured to redress it; either by encouraging and recommending the second way of pleading, which is to shew the condition; or by suffering the plaintiff to set out the condition, and reply that the obligee would take less than the penalty, and that the bond was kept on foot by fraud: and a slight evidence has been admitted as proof of it, and courts have leaned so strongly against these pleas, that it has been held sufficient to falsify any part, and thereby intitle the plaintiff to judgment, as if he had falsified the whole. *Carth.* 196. 431. And this disinclination in courts of law to suffer executors to cheat the creditors by covering more assets than really had been applied, drove executors to state their case according to the real justice of it at once: which was by shewing, that the bonds were conditioned for payment of less sums, and that there was really so much due, which they craved an allowance of. This is the second way of pleading I mentioned, and stands much encouraged by the first instance of it, in 1 *Vent.* 354. *Page* v. *Denton*, where the court said, that if men would plead their case specially, it would save many a suit in Chancery: and Chief Justice *Holt* recommends it for the same reason in *Salk.* 312.

In

In the prefent cafe the defendant has taken this advice, which is the fecond thing I propofed to fpeak to, *viz.* in what manner fhe has pleaded. The conditions of all the three bonds are fet out, and a computation made by her of what is really due for the principal and intereft on each; which (to take a given fum) I may fay amounts to 8000 *l.* and this (fays fhe) remains due and payable, and the bonds are ftill in force: and that fhe has adminiftred all the affets but 1000 *l.* which is liable to the payment of the feveral fums by the bonds, articles and judgment due and payable.

I muft admit, that fhe has not in words at length confeffed that this 8000*l.* is all that remained due, by adding the negative words *and no more:* but if that fhould be thought material to make a part of the cafe, I infift it muft be fo taken upon this plea. [1031] The rule of law is, that every man's plea fhall be taken moft ftrongly againft the pleader, for he is prefumed to know his own cafe beft; and I am pretty confident that no cafe can be fhewn, where the court either prefumed there might be more due than the defendant fhewed, or expected the plaintiff to reply that there was no more due. And it would be a trap if they fhould, for either it would be material in the replication to fay fo, or not. If it be material, then iffue may taken on it, and the defendant by faying fo much is due draws in the plaintiff to fay there is no more, and proves the iffue by falfifying his own plea. If it be not material, then it muft be taken upon the plea, that the fum mentioned is the fum due and no more. In *Co. Litt.* 303. *b.* the rule is laid down, *ambiguum placitum interpretari debet contra proferentem.* If this then be neceffarily implied on the plea, it muft be taken in as part of the cafe, though not fo averred in the replication. And as to replications, it is a general rule, that in all cafes but the plea of *Nul agard fait*, it is fufficient for the plaintiff to meet the plea, and falfify the excufe. *Salk.* 138. and that we have done in the prefent cafe.

It is a general rule, that the fame word in the fame inftrument, will, or record, muft have the fame fignification; unlefs it manifeftly appears, that there is a neceffity to put a different conftruction. In the plea, what fhe fays is due and payable on thefe bonds, &c. is (for inftance) 8000 *l.* Says the replication, you have affets *ultra* what is due and payable by thofe bonds, *i. e.* affets above 8000*l.* you can pay what you fay is due, and have money to pay me alfo; the words of the replication are, *ad fatisfaciend' feparal' denar' prædict' per fcripta obligatoria &c. debita et folubilia.* Now the word *prædict'* muft refer to the laft antecedent, which is the leffer fums and not the penalties. There is no difpute between the parties what is the fum due, the plain-

 tiffs

tiffs muſt ſubmit to take it on her ſhewing, and upon that foot go into the account. And a man muſt be endowed with a very legal underſtanding, to conceive how it is poſſible, that the penalties can upon ſuch pleading be ſaid or underſtood to be taken into the account.

But the objection is, that at law the penalty is the debt, and therefore when the plaintiffs in a legal proceeding ſpeak of what is due by the obligation, they muſt mean the ſtrict legal debt, to be relieved againſt which there muſt be a ſuit in equity. And I own that there are caſes, in which to many purpoſes it is ſo conſidered: but the laudable endeavours of courts of law, to let in as much equity as they can, have in this inſtance overcome that conſtruction. It will not be diſputed, but that upon the iſſue of *plene adminiſtravit* an executor can be allowed no more than the leſſer ſum and intereſt: nay where upon the preſent plea judg-
[1032] ment was taken of aſſets *quando acciderint*, and a *ſcire facias* brought; the Chief Juſtice of the Common Pleas, before whom it was tried, would allow no more to be covered than a court of
Ante 867. Equity would do. In the caſe of *Tully* v. *Sparks*, *B. R. Paſ.* 3 *Geo.* 2. it came to be a queſtion, what was the conſtruction of the word *debt* in the acts about bankrupts: the caſe was, that the bankrupt gave a bond conditioned to leave *Martha Latimer* 400 *l.* if ſhe married, and ſhould ſurvive him: both facts fell out ſo; and the executor of the bankrupt was ſued, and pleaded the commiſſion and diſcharge: and on argument it was much inſiſted, that the ſtatute 5 *Geo.* 1. *c.* 24. had diſcharged the bankrupt from all *debts contracted*; and according to the rule of law, this was *debitum in præſenti*, and conſequently *then* contracted, and ſo releaſed: the court allowed the general doctrine, that to many purpoſes it was ſo; but held, that in that inſtance another ſenſe was to be put upon it, *viz.* a *demandable debt*, that being what was meant by the Parliament, and they were not bound down to the ſtrict legal notion of a debt. In the preſent caſe I apprehend there is as little reaſon to bind us down to the ſtrict legal notion, as in that.

In *Page* v. *Denton*, 1 *Vent.* 354. debt upon bond was brought againſt an executor, who pleaded that the teſtator was indebted to him by an obligation, the condition whereof was to pay rent, and that at the time of the teſtator's death there was 300 *l.* due for rent, and he had but 60 *l.* aſſets to pay ſuch rent. The plaintiff replied, that but 30 *l.* was due for rent at the time of the teſtator's death, which the court held to be a good replication, although the penalty of the bond was forfeited at the time of the teſtator's death; for if a bond due to a ſtranger is forfeited, and this is pleaded by an executor, and that he has not aſſets *ultra*; it

it is a good replication to ſay, that the obligee would have taken his debt in full; and it ſhall be a bar for no more; and here the defendant ought to take but his debt due: and the court ſaid, that if men would plead their caſe ſpecially, it would ſave many a ſuit in Chancery. The true reaſon of this caſe muſt be, that by the defendant's diſcloſing in his plea the condition of the bond, and alleging that 300 *l.* was due for the rent, he thereby waived the penalty of the bond, and made his demand only for the rent: and if by ſuch plea more was alleged to be due for rent than was really due, the plaintiff had a right to reply, that only ſo much was due. In the preſent caſe the defendant might have pleaded the penalties, without ſetting out the conditions; but by ſetting out in her plea the money due by the conditions, ſhe ſhews that ſhe did not intend to cover the aſſets with the penalties, but only for ſo much as would anſwer the conditions. That caſe therefore differs from the preſent in this reſpect, that there the plaintiff diſputed the *quantum* of the rent by the plea alleged [1033] to be due, but here the plaintiffs were ſatisfied with the plea as to the monies alleged to be due by the conditions: and if the plea had been untrue with reſpect to the *quantum*, the plaintiffs might have replied that leſs was due; but inſtead of diſputing that point, they have ſubmitted to it. If the penalties can be inſiſted on, to what end are the conditions ſet out? they could only be ſet out in conſequence of *Holt*'s advice, to come at once into the juſtice of the caſe, without being intangled with a ſuit in equity. He could not mean, that after the conditions are ſet out, the penalties are ſtill to cover. And there is no inſtance of replying *per fraudem* to ſuch a plea, though frequently before; which ſhews it has been always underſtood, that the plaintiff is by that pleading delivered from the penalties, and it is brought to the queſtion, what is really due: and when ſhe ſays ſo much is due, and ſhe can only pay that, and the other ſide ſays you have more than ſufficient to pay what is due; it cannot be doubted, but that they both meant the ſame thing.

It is the endeavour of all courts, to bring the deciſion of cauſes to that which is the real juſtice and merits of the caſe: what that is in the preſent inſtance, cannot bear a moment's diſpute: neither can it bear a diſpute, what the defendant claimed an allowance of: it would therefore be very harſh, to ſay ſhe ſhall be allowed more than in juſtice ſhe claims or is intitled to. Nor can this be done, but by determining, that a different conſtruction is to be made of the words, *the ſaid money due and payable*, in the plaintiff's replication, than in her plea; which I have before ſhewn to be contrary to the rules of conſtruction, and I am ſure is contrary to the juſtice of the caſe.

Suppofe the plaintiffs had replied, that the obligees were willing to take fums mentioned in the plea, and that the bonds were kept on foot by fraud: I fhould much doubt, whether that would be good. Becaufe the defendant would have faid, you miftake my plea, I only infift to cover 8000 *l.* by thefe bonds, and you fay 8000 *l.* only ought to be covered, in which we agree. Our conftruction does the defendant no injury. The contrary introduces a manifeft injuftice; and as the law is already hard enough upon creditors, there is no reafon to introduce a new hardfhip.

Whatever the cafe may be as to *Wilfon*'s and *Campbell*'s bonds, which appear to have been forfeited in the life of *Humphry Morice*; yet it is apprehended, that as Sir *William Morice*'s bond was not a forfeited one, the cafe upon that bond might be diftin-
[1034] guifhed from the other two, if it was neceffary to run any fuch diftinction, as I hope it is not.

Lord *Hardwicke* delivered the refolution of the court.

There are three points confiderable in this cafe. 1. Whether upon thefe pleadings the penalties, or the leffer fums, ought to be confidered as the debt due to *Wilfon* and *Campbell*. 2. Whether there is any legal difference between thofe bonds, and that to Sir *William Morice*. And 3. What judgment the court can give upon this verdict, confidering the opinion they are of.

As to the firft, there is nothing more certain, than that when the day is paft, the penalty is the debt, and the remedy was in equity. It is admitted, the defendant might have pleaded the obligation only; but it is contended, that here fhe has claimed only the leffer fums. And my brothers *Page* and *Probyn* and myfelf (my brother *Lee* declining for particular reafons to give any opinion) think, that the penalties on thefe two bonds ought to be confidered as the debt at law.

The ancient way of pleading was only to fet out the bond, and fo are the old entries; I cannot find when this was departed from, but believe it was, when the Judges found what inconvenience it was to plaintiffs in not fetting out the whole, as appears by the
1 Vent. 354. cafes of *Page* v. *Denton*, *Parker* v. *Atfield*, from which it was
Salk. 311. argued for the plaintiffs, that when the condition fhews what is due, why fhould more affets be covered, or how are fuits in equity avoided? This weighed greatly with me a long time. But upon great deliberation I am of opinion, that thofe *obiter* fayings are not fufficient, and that this way of pleading may ftill have great ufe.

The

The plaintiff cannot have *oyer*, becaufe the defendant is not fuppofed to have the bond, and therefore makes no *profert* of it: he cannot tell whether it be a bond for payment of money, or performance of covenants, and muft therefore be forced to bring a bill in equity for difcovery to reply by. All this is avoided by the fpecial way of pleading; and therefore fatisfies the expreffion, That it will fave many a fuit in equity. The penalty is a fecurity for cofts, and on the act for amendment of the law fome cofts muft be incurred, before a motion to pay can be received; and this is a lofs he may fuftain by taking it fhort upon his plea, without putting the plaintiff to fhew fome fraud; and it may be dangerous for us to blend the rules of law and equity together.

The cafe of *Page* v. *Denton* at firft fight feemed ftrong for the plaintiffs. But confidering it as a bond to the executor, who would retain, and not a bond to a ftranger; it could not be replied to as fraud, for it was payment in his hands, and the fame as if a ftranger had been paid the leffer fum and intereft. [1035]

The cafe of *Thompfon* v. *Hunt* in 3 *Lev.* 368. (and which is mentioned as law in *Lutw.* 450.) is ftrong for the defendant. For though there the penalties only were pleaded, and the conditions appear in the replication, whereas here it is all in the plea, yet that makes no real difference, for when in the rejoinder the defendant took iffue on the penalties, he admitted the replication, and fo made it part of his plea.

It was infifted here, that the defendant by the manner of her pleading feems only to claim a protection for the leffer fums, and the conclufion of her plea relates to that. This at firft feemed to have weight, but upon a nice infpection, there appears a variation in the expreffion, one being *due and unpaid*, and the other *due and payable*. But there is a more fubftantial anfwer, for as to the articles the penal fums of them are averred due, and therefore the general words cannot fometimes refer to the penalties, and at other times to the leffer fums. And though it was objected, that there is no precedent of a replication *per fraudem*, where the condition is fet out; it may be anfwered, that there never was a precedent of a plea worded as this is.

As to the practice at *nifi prius* on *plene adminiftravit*; it may be the executor defires no more allowance, to avoid a fuit in equity. And on the trial in *C. B.* on the *fcire facias* there, it appeared the leffer fums had been received, and the bonds delivered up.

Whatever

Whatever therefore my firft thoughts were, and how much foever the law of executors wants alteration; we think, that as to the two bonds which were forfeited, the defendant muft have an allowance for the penalties: and we muft *ftare decifis*.

2. The next thing to be confidered is, whether the bond to Sir *William Morice* differs from the others. And we are all of opinion it does, inafmuch as there the former inftalments were paid, and the other two the time was not come for: and it is no more than a bond for payment of money at a time to come, which is certainly pleadable. 1 *Roll. Abr.* 925. *Cro. Car.* 363. But then it fhall cover no more than is due; for the force of the bond is fufpended, till the condition is broken, which ap-
[1036] pears by the manner of pleading it, *Cro. Eliz.* 315. where the claim is only for the 20*l.* in the condition. 3 *Lev.* 57. Here it is in her power to fave the penalty, and affets fo to do are admitted by pleading: it will be a *devaftavit* in her to fuffer the affets to be further charged. 1 *Vent.* 198. 2 *Lev.* 139. Another reafon to diftinguifh this is, that *per fraudem* could not be replied; for it is no fraud not to pay before due.

3. The laft thing is, what judgment can be given upon this opinion. And this is matter of great difficulty, for the affets are found in one intire fum; and the queftion is, whether we can fever them, or muft not award a *venire de novo*. And we defire to have this fpoke to.

At another day therefore *Strange* argued, that the court being of opinion, that the penalties of two of the bonds ought to be allowed, but not the penalty of the third; the plaintiffs might have the benefit of this opinion, by adjufting the account of affets, and making the defendant a proper allowance, without awarding a *venire de novo*.

Two things are to be confidered: 1. What allowance fhe is intitled to: 2. How it can be made her on this record.

As to the firft the account ftands thus: *Wilfon*'s penalty is 5000*l.* of which fhe has been allowed for the leffer fum and intereft 2,520*l.* fo there remains to be allowed 2,480*l.* *Campbell*'s penalty is 3000*l.* Already allowed 1,540*l.* remains to be allowed 1,460*l.* On Sir *William Morice*'s bond allowing intereft for each of the two inftalments unpaid, even to the time of payment, it will be 370*l.* which added to the 2,480*l.* and 1,460*l.* makes in all 4,310*l.* which 4,310*l.* being deducted out of the affets found, being 18,969*l.* 12*s.* 5*d.* there will remain in her hands liable to make us fatisfaction 14,699*l.* 12*s.* 5*d.*

The

The fecond queftion is, how this allowance can be made her on this record. As to the 4000 *l.* part of the penalties, they appear upon the record; and as to the intereft computed, the times appear, and the court muft take notice what is legal intereft, it being fettled by act of Parliament. What then fhould hinder the court from making thefe deductions, which upon the evidence laid before them it appears fhe is intitled to?

My Lord *Hobart* 54. fays, However a verdict feems to ftray, and conclude informally, or not punctually upon the iffue, fo as you cannot find the words of the iffue in the verdict, yet if a verdict may be concluded out of it to the point in iffue, the court fhall work it into form, and make it ferve. So 1 *Sid.* 27. *Carter* 80. a fpecial verdict, which is the words of *lay gents*, is not expected to be fo exact as pleadings, and therefore the court will make a reafonable intendment. Here the court can conclude exactly what the *quantum* of affets is, which the defendant is to be charged with, and can precifely determine it. In the common cafe of a verdict for more than the plaintiff declares for, the court takes notice of that, and takes care to adjuft the difference. So is *Tho. Ent.* 458. 2 *Book of Judg.* 151. 187. 165. [1037]

In the prefent cafe the entry may be, *quia videtur curiæ*, that the penal fums in two of the bonds, and intereft for the remainder of the other, ought to be allowed the defendant, and that therefore the jury have charged the defendant with 4,310 *l.* too much affets; *ideo* that 4,310 *l.* *ex affenfu querentium*, being deducted out of the affets found, let the plaintiffs have judgment to recover the reft.

There is no difficulty upon the fpecial conclufion of the verdict, whereby the jury have left it to the court, only on the point whether the three penalties ought or ought not to be allowed, and have not in their finding provided for the middle cafe, which has now happened; for this muft be confidered as leaving the whole matter at large to the court, who muft conclude as the jury ought to have done, on a general verdict.

Suppofe on the trial the Judge had given the prefent opinion, muft not the jury have found 14,659 *l.* 12 *s.* 5 *d.* affets? Inftead of this they have ftated the facts on record, and left the court to make the conclufion.

The cafe of *Hays, Hil.* 1 *Geo.* 2. *ante* 844. is in point. He was indicted, 1. for forging a bond, 2. for publifhing *fuch* bond fo by him forged, and 3. for publifhing *a* forged bond, knowing it to be forged: he pleaded Not guilty to all three. And a fpecial

cial verdict was given, that he forged a bond in the words and figures following, and that he publiſhed the ſame; but they ſay nothing of the third offence; and conclude, that if upon this evidence the court is of opinion he is guilty of the facts charged in the indictment, then they find him Guilty; and if the court think him Not guilty, they find accordingly. Upon argument the court was of opinion againſt the defendant, but held they could not give a general judgment, that he was guilty of all the three offences, the evidence only warranting the two firſt; and as the laſt was not confined to the ſame bond, or if it was, yet every publication being a diſtinct offence, there was no fact found to warrant a conviction for the laſt. But then they
[1038] ſaid, they were not tied up by the ſpecial concluſion, but that the whole evidence being laid before them, they were to do what the jury ought to have done; and therefore they adjudged that upon the matter referred to them by the jury, it appeared to the court, that the defendant was guilty of the forgery and firſt publication, and not guilty of the reſt. This being a criminal caſe, and in point, puts an end to all difficulties about the ſpecial concluſion.

Et per Chief Juſtice, I am glad this has been argued, being thereby confirmed in the method I propoſed to put it into: and *Hay*'s caſe is in point, where the court made the jury give two verdicts, one for the King and the other for the defendant. And we can adjuſt the allowance to be made, without introducing or ſuppoſing any new fact. The caſes of ſevering damages which are intire, are ſtronger than the diviſion of aſſets. In *Townſ.* 2 *Jud.* 117. 151. 189. the entries are as that in *Thompſon*, and they warrant our giving judgment in the manner that is prayed on the behalf of the plaintiffs. And judgment was entered accordingly (1).

(1) See the entry of the judgment at large. *Caſ. temp. Hard.* 230.

Easter Term

9 Georgii 2 Regis. In B. R.

Philip *Lord* Hardwicke, *Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq*;

John Willes, *Esq*; *Attorney General.*
Dudley Ryder, *Esq*; *Solicitor General.*

Dominus Rex *verf.* Carpenter.

A Rule was made for the defendant to fhew caufe againft an information in nature of a *quo warranto*, to fhew by what warrant he claimed to vote in the election of mayor of *Exon*; on pretence that the right was reftrained to refident freemen, which the defendant was not. And on fhewing caufe, it appearing clearly, that both by the charter and ufage the defendant was intitled to vote; the court difcharged the rule with cofts. *Quod nota* as to cofts (1).

Cofts given on difcharging a *quo warranto.*

(1) *Rex* v. *Lewis*, 2 *Burr.* 780. *Say. Law of Coft* S. C. S. P.

Hall *verf.* Howes.

THE defendant was furrendered by his bail after judgment, and lay two terms without being charged in execution: after this he fuperfeded himfelf. And then the plaintiff brought debt upon the judgment. And the court held, that common bail only fhould be required, it being the plaintiff's own laches, not

No fpecial bail in debt on judgment after defendant has been fuperfeded.

Caf. temp. Hard. 244. S. C. More full cit. And. 15.

not to detain him when he might: and it was said to have been so ruled *Hil.* 8 *Geo.* 2. *in B. R. Clever* v. *Jordan*, and to be the constant practice in *C. B.* (1).

(1) *Taylor* v. *Wastneys, post.* 1218. *Crutchfield* v. *Seyward*, 2 *Wils.* 93. *Sed vide Chambers* v. *Robinson, ante* 782. *De La Cour* v. *Read*, 2 *H. Black.* 278.

[1040]

Rogers *verf.* Birkmire.

Where two parcels of land are distinctly let, there cannot be a joint distress for both rents. Cas. temp. Hard. 245. S. C. more full.

IN trespass for taking goods, the defendant justifies, that he demised (1) some tenements to the plaintiff for one term, and others for another term; and there being rent arrear on both demises, he distrained the goods. And on demurrer it was held ill, for these being separate demises, there ought to have been separate distresses on the several premisses subject to the distinct rents: and no distress on one part can be good for both rents. The plaintiff had judgment.

(1) Both demises were contained in the same lease. *Vide* the report *Cas. temp. Hard.*

The King *verf.* The Inhabitants of Preston on the Hill in Cheshire.

No bill of exceptions lies on summary proceedings about settlements. Burr. Sett. Ca. 77.–Sess. Ca. Ed. 1750. 2 vol. p. 254. No. 172. and Cas. temp. Hard. 249. S. C.

UPON appeal to the sessions from an order of two justices, the sessions affirmed the order, refusing to state the case specially. Whereupon the parish to which the *pauper* was sent tendered a bill of exceptions, wherein the fact was stated, that the *pauper* had executed the office of parish clerk in the parish from whence he was removed, notwithstanding which the sessions had determined it no settlement, it not appearing how he came to be nominated to the office: and this bill of exceptions was sealed by two justices, and returned up with the orders.

And upon the merits the court was clear, that the justices had erred, the executing the office being indisputably a settlement. But the great doubt was, whether they could take the merits into consideration; it being objected, that a bill of exceptions would not lie in this case of a summary proceeding on a new jurisdiction given by act of Parliament, where the proceedings were always in *English*, and the words of the statute being *aliquis implacitatus*, which mean a proceeding by the course of the common law in a civil suit. And *Salk.* 284. 263. *Carth.* 394. 1 *Lev.* 68.

58. 1 *Sid.* 84. 5 *Co.* 104. *Cro. El.* 751. *Co. Litt.* 72. *a.* were cited.

On the other hand it was insisted, that the word *justiciarii* would take in the sessions. 4 *Inst.* 427. *Ryley's Placita Parl.* 659. That in the case of *Liverpoole* it was determined to lie on proceedings in the petty bag. That it was never determined not to lie in criminal cases, except in Sir *H. Vane's* case; where the only reason given is, that it would take up too much time at an assises. And in *Lamb. lib.* 4. *c.* 13. it is mentioned, that justices of the peace may seal a bill of exceptions upon an indictment.

Sed per curiam, Though it has been often wished that such a bill would lie in cases of settlements, where justices often take too great liberties; yet the inconveniences will be such as out-weigh any benefit that might arise in a particular instance. It will multiply expence, and make summary jurisdictions useless. Lord *Coke* considers it only as lying in actions, but is silent as to summary or criminal proceedings. And though *Lambert* is as cited, yet it is only what he delivers as from *Marrow,* and has never been followed by any judicial opinion. It was the intent of these acts, that what the justices do shall be final as to fact, and every thing but the law appearing upon the face of the order. It is also a strong reason, that error will not lie, for it is only where the cause comes by writ of error or return, that a bill of exceptions can be debated. In a trial at bar it is never argued, but in the superior court on error. We give no opinion as to criminal cases, in which Lord *Raymond* doubted *Hil.* 2 *Geo.* 2. *Rex* v. *Bunch,* which was the case of a libel, and the Attorney General put an end to the question by withdrawing a juror. The never attempting such a bill, when we all know there have been many occasions for it, is a strong argument against it (1). [1041]

Et per curiam, Let the rule for confirming the order be taken specially, the court being of opinion, that no bill of exceptions lay.

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(1) *Rex* v. *Owlton, Burr.* S. C. 64. S. P.

Dominus Rex *verſ.* Wright et ux'.

On indictments the defendants may be admitted *in forma pauperis*. Caſ. temp. Hard. 211. 253. S. C. Much fuller and ſeveral precedents cited 3 Bac. Abr. 812. S. C.

THE defendants were indicted for a conſpiracy, and the queſtion was, whether they could be admitted to defend *in forma pauperis*. And upon conſideration and ſearch of precedents, the court was of opinion they might: for though it is not within the ſtatute 11 *Hen.* 7. *c.* 12. which relates to civil ſuits only; yet it might be reaſonable to do it on indictments at common law, where the proſecutor, who can have no coſts, is not prejudiced. And the inſtances vouched ſhew it to be the courſe of this court. In the Exchequer indeed there was a proviſion by 2 *Geo.* 2. *c.* 28. for defendants in cuſtom-houſe cauſes, but that might be thought neceſſary, there being no ſuch practice there. A rule was made on the uſual affidavit, for the defendants being admitted *in forma pauperis* (1).

(1) *Anon.* 6 *Mod.* 88. *Rex* v. *Reynolds*, 1 *Black.* 230. S. P. *Vide Rex.* v. *Pearſon*, 2 *Burr.* 1040.. 16 *Vin. Abr.* 259.

[1042]

Dominus Rex *verſ.* Morgan.

The ſtatute for coſts on informations extends to caſes of *quo warranto*.

ON an information in nature of a *quo warranto* for the office of burgeſs of *Cardiff*, a recognizance was taken as upon the ſtatute 4 & 5 *W.* & *M.* *c.* 18. and not being tried within the year, the court was moved for coſts againſt the proſecutor; which was oppoſed, on pretence that theſe informations were not within the act, which ſpeaks only of treſpaſſes, batteries, and other miſdemeanors. *Sed per curiam*, A uſurpation is a miſdemeanor, and the practice of taking recognizances is the beſt expoſitor. Beſides, this has been determined in *Salk.* 376. But as here has been no verdict or judgment, it muſt not be coſts generally, as on 9 *Ann.* *c.* 20. but reſtrained to 20*l.* as on the 4 & 5 *W.* & *M.* (1)

(1) *Rex* v. *Howell*, *Caſ. temp. Hard.* 247. S. P. *Vide* alſo *Rex* v. *Filewood*, 2 *Term Rep.* 145. that the court in granting an information upon this ſtatute will not require the proſecutor to give ſecurity for the coſts above 20*l.* in the event of the defendants being acquitted. *Rex* v. *R. Brook*, 2 *Term Rep.* 197. See alſo *Rex* v. *Powell*, *ante* 33. In the note to that caſe I have made a *quære*, whether the proſecutor ſhould be there liable to coſts beyond the extent of his recognizance. But I have ſince met with an anonymous caſe, *Say. Rep.* 130. which ſtates, that where the relator *does not proceed to trial purſuant to notice*, it is within the equity of 9 *Anne* *c.* 20. that he ſhall pay coſts.

Sir William Halton, Baronet, *verſ.* Haſſell.

AT *niſi prius* in *Middleſex* in an action brought for a fine of 75 *l.* on admiſſion of the defendant to a copyhold. It appeared that the premiſſes were of the value of 50 *l.* *per annum*, and a year and half being 75 *l.* was aſſeſſed: the defendant inſiſted to pay only 24 *l.* it appearing his rent was but 16 *l.* the reſt ariſing from improvements made under an old leaſe by licence of the lord. And Lord *Hardwicke* was of opinion, that the fine ſhould be ſet according to the preſent improved value, which is all the lord has to look after; and if it was otherwiſe, this might open a door to defeat the lord in a great meaſure. So there was a verdict for 75 *l.* for the plaintiff (1).

Fines to be ſet according to the improved value.

(1) *Aſtle* v. *Grant*, *Doug.* 724. (*n.* 2.) 3 *Com. Dig.* (H. 4.) 179.

Ambroſe *verſ.* Clendon. At Guildhall.

IN this caſe it was ruled, as in *Toms* v. *Mytton*, *Hil.* 13 *Geo.* 1. *ante* 744. that if the debt of the petitioning creditor appeared to be contracted after the act of bankruptcy, it could be no ground for a commiſſion; but where *A.* had 100 *l.* owing on ſimple contract before an act of bankruptcy, and one is afterwards ſecretly committed, and then a bond taken; it ſhall not ſo far extinguiſh the ſimple contract, as to deprive the creditor of petitioning for a commiſſion (1).

Though a bond is taken for a ſimple contract debt, yet if it is after an act of bankruptcy, the ſimple contract is not extinguiſhed. Caſ. temp. Hard. 267. S. C.

(1) *Vide Blandford & al'* v. *Foote*, *Cowp.* 138.

Dominus Rex *verſ.* Nunez. [1043]

ON trial of an indictment for perjury in an anſwer *in Scaccario*, the caſe made by the plaintiff was, that ſhe gave the defendant a note for twenty guineas, which he promiſed not to put in ſuit againſt her, but to take it of a debtor of the plaintiff's: notwithſtanding which he had ſued her, and therefore ſhe prayed an injunction. The defendant denied any ſuch agreement. And on this denial the perjury was aſſigned, and the plaintiff called as a witneſs, on the authority of *Paris*'s caſe, 1 *Vent.* 49. 1 *Sid.* 431. and *The King* v. *Moiſe*, *Trin.* 10 *Geo.* 1. *ante* 595. (1) But the Chief Juſtice ruled, that ſhe could not be a

Giver of a note no witneſs on indictment for perjury in denying an agreement not to put it in ſuit. *N. B. In Scaccario* the defendant ſigns his anſwer, ſo the proof here to tell it was only the hand of the Baron and the defendant.

Caſ. temp. Hard. 265. 2 Seſſ. Ca. p. 377. No. 201. S. C.

(1) *Vide Rex* v. *J. Morris*, 2 *Burr.* 1189.

witness, and relied on the case of *Rex* v. *Whiting* in *Salk.* 283. He said *Paris*'s case was against *Twisden*'s opinion, and had not been much liked since (2).

(2) *Rex* v. *Rhodes, ante* 728. *Bull. L. N. P.* 288. But in *Rex* v. *Broughton. post.* 1229. *Abraham* v. *Bunn,* 4 *Burr.* 2251. this case seems to have been over-ruled. But see *Rex* v. *Eden, Hil.* 34 *Geo.* 3. *Sittings at Midd. Espin. Cas. at N. Pri.* 47.

Bush and others, Assignees of Jones, *vers.* Gower.

Usury cannot be pleaded to *sci' fa'* on a judgment, but it may be brought on by motion to vacate the judgment. (1) Cas. temp. Hard. 233. much fuller.

TO a *scire facias* on a judgment by confession, the defendant pleaded, that the warrant of attorney was given on an usurious contract. And upon demurrer it was held, that this was not within the statute 12 *Ann. st.* 2. *c.* 16. or to be got at this way; for this is no contract or assurance, a judgment being *redditum in invitum.* The court however inclined, that it might be got at on a motion to vacate the judgment, as was done in *C. B. Trin.* 3 *Geo.* 1. *Jackson* v. *Mosley,* where a warrant was obtained from an infant. On the statute *de relegiosis,* who are restrained from obtaining lands *arte vel ingenio*; yet a *pracipe* being brought, and judgment had, there was forced to be the aid of Parliament to inquire into collusion.

(1) *Middleton* v. *Hill, Cro. Eliz.* 588. *Goldsw.* 128. S. C. *Rowe* v. *Bellaseys,* 1 *Sid.* 182. *Vide Cooke* v. *Jones, Cowp.* 727.

Hockley *vers.* Merry.

Where there is an act of bankruptcy between becoming bail on error and the affirmance, the party is not discharged from his recognizance. Cas. temp. Hard. 262. S. C.

THE defendant 9 *May* 1734, was bail on a writ of error. On 25 *October* 1734, he committed an act of bankruptcy, and after a commission obtained his certificate. On 12 *November* 1735, the judgment was affirmed. And in debt upon the recognizance, he pleaded his discharge, and that the cause of action arose before his bankruptcy. And the Chief Justice on the trial held, that the defendant was not discharged, according to the case of *Tully* v. *Sparks, Pasch.* 3 *Geo.* 2. *ante* 867. for this was but a contingent debt, for which the plaintiff could not come in under the commission: the statute 7 *Geo.* 1. *c.* 51. only letting in those where the payment was certain, though future. There was a verdict for the plaintiff (1).

(1) See *ex parte Todd,* 3 *Wils.* 270. *Waller* v. *Sherlock, ib.* 272. *Ex parte Groome,* 1 *Atk.* 119. *Ex parte Marshall,* 1 *Atk.* 129. *Mason* v. *Vere,* 2 *Black.* 1217. *Ludford* v. *Barber,* 1 *Term Rep.* 86. *Thompson* v. *Cruikshank, post.* 1160. and the cases there cited.

Trinity Term

* 9 Georgii 2 Regis. In B. R.

* This term did not begin till *Friday* 25th *June*, 1736, consequently the whole of it fell within the tenth of the King, whose accession was 11 *June*, 1727: See Burr. Sett. Cas. 87. *n. to 2d edition.*

Philip *Lord* Hardwicke, *Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq;*

John Willes, *Esq; Attorney General.*
Dudley Ryder, *Esq*; *Solicitor General.*

Morgan *verf.* Luckup. 4 AD. V & 284

No pleading double in a *qui tam.* Ann. 262. S. C. 9 Ann. c. 14. 4 Ann. c. 16.

IN a *qui tam* on the statute of gaming it was held, that the defendant could not be admitted to plead double, the act for amendment of the law excluding popular actions. And it was said to have been so held *Trin.* 13 *Geo.* 1. *inter Webb et Urlin* (1). 1 *Barn. B. R.* 17.

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(1) S. P. *Law* v. *Crowther*, 2 *Wilf.* 21. *in C. B.* *Lookup* v. *Frederick*, *Barnes* 365. *Heyrick* v. *Foster*, after time to consider, 4 *Term Rep.* 701.

Dominus Rex *verf.* Badouin.

Practice. Caf. temp. Hard. 271. S. C.

A Rule was made for the defendant to shew cause why there should not be an information against him. And upon an affidavit of serving the wife at his house, I moved to make it absolute: it was agreed, that personal service was not necessary,

and that this was *prima facie* a good ſervice. But the wife making affidavit, that he was gone beyond ſea a week before the ſervice, the court held it not to be good; for leaving at the houſe is only good upon a ſuppoſition the party is there, whereas now the contrary appears.

[1045]

Smith, qui tam, *verſ.* Gibſon.

Abatement. Caſ. temp. Hard. 271. much fuller.

ACTION upon the ſtatutes of 13 *Ric.* 2. *c.* 5. 15 *Ric.* 2. *c.* 3. and 2 *Hen.* 4. *c.* 11. for impleading the plaintiff in the admiralty for a matter at land, and arreſting the two and thirtieth part of the ſhip, which two and thirtieth part belonged to the plaintiff, whereby the ſhip was detained, and he was put to expence.

The defendant pleaded in abatement, that there were other part-owners not joined in the action, who it appeared were injured as well as the plaintiff, ſince the whole ſhip was detained in detaining a two and thirtieth part.

Sed per curiam, The *git* of this action is the ſuit in the admiralty, which was againſt the plaintiff only, and therefore the reſt of the part-owners could not join; and there muſt be a *reſpondeas ouſter.*

Stoughton *verſ.* Reynolds.

The right of adjourning a veſtry is in the pariſh at large. Caſ. temp. Hard. 274. Fort. 168. S. C.

ACTION upon the caſe for a falſe return of a *mandamus,* directed to the defendant as archdeacon of *Northampton,* commanding him to ſwear the plaintiff into the office of church-warden of *All-Saints* in the town of *Northampton,* to which writ the defendant had returned that the plaintiff was not elected.

Upon Not guilty pleaded the jury find this ſpecial verdict.

That *All-Saints* is an ancient pariſh and has yearly choſen two church-wardens in *Eaſter-week,* by the vicar's nominating one and the pariſhioners the other. That in *Eaſter-week* 1734, the vicar nominated *Benjamin Chapman,* and the pariſhioners nominated the plaintiff, to be church-wardens for the year enſuing, and until others were admitted and ſworn, and that both were ſworn in, purſuant to ſuch election. That on *Eaſter-monday* 1735, a veſtry was held in the church for a new election; the vicar took the chair, and the old church-wardens were preſent, and the vicar nominated *Chapman* to be his church-warden for the

the enſuing year. That the plaintiff and one *Farren* were candidates for the other office and each had the votes of ſeveral of the pariſhioners. That before the election was compleated or all had polled, the vicar at the deſire and with the conſent of *Chapman* then preſent, declared the meeting to be adjourned, [1046] and did then in fact adjourn the ſame to the next morning at nine, which adjournment was oppoſed on behalf of the plaintiff by ſome of the pariſhioners. That on declaring the adjournment, the vicar and *Chapman* departed; but the plaintiff and his friends ſtaid, and in fact continued the poll, whereby the plaintiff had on that day the majority of votes. That the next morning the vicar, *Chapman*, and the pariſhioners in their intereſt, met; and in fact continued the poll, upon the cloſe of which *Farren* had the majority of votes. That the plaintiff ſued his *mandamus*, to which *non fuit electus* was returned by the defendant, and alſo that *Farren* was elected, and had been ſworn in. *Sed utrum, &c. Et ſi pro quer' pro quer'* and 12*d.* damages. *Et ſi pro def' pro def'.*

Sir *Thomas Abney pro quer'.* The principal queſtion is, in whom the right of adjourning veſtries reſides. If in the parſon alone, or in him and one church-warden, it is with the defendant: if in the whole pariſh, or in both church-wardens, it is with the plaintiff; for then there was no adjournment, and the poll was regularly continued that day, and at the cloſe the plaintiff had the majority.

By the 89th canon church-wardens are to be choſen by the parſon and pariſhioners jointly, if it may be; if not, the parſon names one, and the pariſhioners are to chuſe another. According to this the parſon has nothing to do in the election of the pariſhioners' church-warden. But however this canon cannot controul a cuſtom. *Cro. Jac.* 532. 2 *Roll. Abr.* 287. *Cro. Car.* 551. *Hardr.* 378. *Carth.* 118. This will be in effect veſting the whole in the parſon, who never ſummons the veſtries, that being the office of the church-wardens.

Bootle contra. I agree, if the right of adjourning is in both church-wardens, or the pariſh at large, our election of *Farren* muſt fall.

The jury have found, that the vicar was in the chair, *i. e.* that he preſided in the aſſembly; from whence it may be naturally inferred, he had the right to adjourn. As no caſe has yet fixed it, conſider it on the reaſon of the thing. Would you take a poll for adjourning? It would be eaſier to go on with the original poll. In popular aſſemblies there is a neceſſity that the

 pre-

presiding person should have this power. Besides, it is found that the plaintiff was church-warden the year before, and was to continue till another was sworn: what occasion therefore was there to re-swear him, supposing him duly elected and *Farren* not? and what damage is there that can support this action? *Hob.* 267.

[1047] Sir *T. Abney* replied, Though the adjournment is pronounced by the person in the chair, yet it is the act of the whole assembly. 1 *Mod.* 194, 236. 2 *Mod.* 222. The custom is to chuse annually, and therefore he must be annually sworn: and as the jury have found damages, it is now too late to make any objection.

C. J. The conclusion of the verdict is general, whether the defendant has made a false return, which depends on the validity of the adjournment. This is a question of great consequence as to the rights of all the parish and their rates, and I have heard nothing to satisfy me that this was a regular adjournment.

The power must arise from the custom, or common law. Here is no custom found, and I know of no book that shews how it stands at common law. As to the vicar, he seems to have no share in the election of the second church-warden, nor to have any right to preside. Is the right of adjourning in the church-wardens? There is no case for that; though if there was, this is found to be the act of one only. We must therefore resort to the common right, which is in the whole assembly, where all are upon an equal foot. And though there may be a difficulty in polling for an adjournment, yet as there is no other way, that must be taken. It would be giving the vicar too much influence, to fix it in him and his churchwarden.

As to the objection that the plaintiff needed not a re-swearing: it is otherwise, and in corporations when mayors are re-chosen, they are always sworn again, though there is a power to hold over.

Cæteri accord'. And the plaintiff had judgment upon the first argument.

Between the Parishes of Heptonstall *and* Evingdon in Yorkshire.

Where children are sent as actually settled, their ages need not be set out. Burr Sett. Ca. 88. S. C. more full.

A Man and four children were sent to *Heptonstall* as the place of their settlement. And I excepted, that the ages of the children were not set out. *Sed per curiam*, That is only neces-

sary where they are sent consequentially to the father's settlement, but here is an express adjudication of their actual settlement. order confirmed (1).

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(1) *Rex* v. *Bramshaw Burr.* 162. *Rex* v. *Bowling, ib.* 177. S. C. 98. *Rex* v. *Uffculm, ib.* S. P. 138. *Rex* v. *Higher Walton, ib.*

Dominus Rex *verf.* Luckup. [1048]

THE defendant was convicted on an information upon the gaming act, which says that he shall forfeit five times the value, to be recovered by a common informer, upon conviction. And it was moved, that a fine should be set upon the defendant, if he refused to speak with the prosecutor. *Sed per curiam*, All the judgment we can give is, *quod convictus est*: and a new action must be brought upon that judgment for the forfeiture, which was thought sufficient to deter the offenders. In the case of recusancy there is no other judgment. *Lutw.* 159, 162. 5 *Mod.* 431. *Cro. Car.* 504. *Co. Ent.* 362. The defendant was discharged without any fine or costs.

The penalty on the gaming act must be sued for after a conviction.
9 Ann. c. 14.
4 Com. Dig. Justices of Peace (B. 42.) 558.

Smith qui tam *verf.* Dunce.

AFTER a verdict against the defendant for suing in the admiralty for a matter at land, in which case double damages are given; it was moved on 2 *Danv.* 221. that the costs *de incremento* should not be doubled. But on citing *Carth.* 321. 10 *Co.* 116. and producing the record of the case of *Child* v. *Sands* mentioned in *Carthew*, where the doubling the costs *de incremento* was assigned for error, and over-ruled; the court was of opinion, that there was no distinction between the costs given by the jury, and those given by the court, but both ought to be doubled.

Costs *de incremento* are to be doubled as well as those given by the jury.
Hullock on Costs. 475.

Dominus Rex *verf.* Davis.

THE statute 10 *Ann. c.* 23. requires the sheriff to deliver to the clerk of the peace all the poll books taken at the election of knights of the shire. In the *Radnorshire* election the sheriff swore a clerk, and each of the candidates had two others, and five polls were taken, which were delivered to the sheriff. He carried in that only which was taken by his clerk, as being the original poll, and the others only checks: and insisted, that the act in requiring all the poll books to be lodged, meant

The check polls as well as the original book must be lodged with the clerk of the peace.

 only

only in the case where the poll is going on at different booths, and all the books make but one poll. But the court held, that all the books ought to have been carried in; and granted an information against the sheriff for not doing it.

N. B. Upon a reference to Mr. Attorney and me, we reported for a *nolle prosequi*, it not being a wilful, if any mistake.

[1049]

Dominus Rex *vers.* Morgan.

Certiorari to Old Bailey for a defendant.

Ante 549, and the note 583, 711. Post. 1068.

A *Certiorari* was granted, to remove an indictment of perjury from the *Old Bailey*, on the part of the defendant, upon an affidavit that he had twice paid costs for not going on to trial, the Judges being gone away; which the court allowed to be a special reason, that distinguished this from the common case, where *certiorari's* are denied.

Wigley *vers.* Morgan un', &c.

Where an attorney is defendant he may change the *venue* into *Middlesex* (1). Cas. Temp. Hardw. S. C. 285. Andr. 384.

THE question was, whether an action *against* an attorney, he had privilege to change the *venue* into *Middlesex*, as well as to lay it there when he is plaintiff. And the court held there was no difference. *Vide Salk.* 668. 2 *Show.* 176. 2 *Lill. Pract. Regist.* 370. 1 *Keb.* 277. *Mich.* 11 *Geo.* 1. *Townsend* v. *Duppa*, (*ante* 610). 2 *Vent.* 47. The *venue* was changed into *Middlesex* in this case.

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(1) *Vide Pope et ux.* v. *Redfearne*, 4 *Burr.* 2027. Where this case was over-ruled, and it was settled that an attorney defendant has no such privilege, see also the cases collected by Sir *James Burrows*, in a note there, and *Yeardly* v. *Rowe*, 3 *Term Rep.* 573. *R. acc.*

Holdfast *vers.* Freeman et al'.

Practice.

THE notice in ejectment was to appear on the essoin day of this term, And held ill, for it should be to appear the first day in full term, which is the appearance day.

Williams *vers.* Jones.

A battery cannot be justified by an arrest only. Cas. Temp. Hardw. 298. S. C. more full.

IN trespass, assault, and battery; the defendant justified an arrest under process. And on demurrer it was objected, that though process will justify the assault in arresting, yet to justify a battery, resistance or an attempt to rescue himself should be shewn;

ſhewn; and *Lutw.* 929. was cited, and precedents, where the plea is Not guilty to the battery, and a juſtification as to the aſſault. *Co. Ent.* 303. *b.* *Tho.* 306. 1 *Brown.* 237, 238. 2 *Brown.* 134, 145, 146. *Hearne* 489. 2 *E.* 4. 6. *b.* 2 *Roll. Abr.* 546.

And after time taken to adviſe, the Chief Juſtice delivered the opinion of the court, that the plea was ill; and the plaintiff had judgment (1).

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(1) *Vide Truſcott* v. *Carpenter*, 1 *Ld. Raym.* 229. *Bull. L. N. P.* 19.

Dominus Rex *verſ.* Jenkins. [1050]

TWO juſtices made an order, reciting that the defendant had been charged with being the father of a baſtard child, and that upon examination into the matter they were of opinion he was not ſo, and do therefore adjudge that he be acquitted thereof.

Two juſtices cannot acquit a man charged with a baſtard. Caſ. Temp. Hardw. 38. 2 Seſſ. Ca. p. 229. no. 161. Foley, 421. S. C.

And the court upon conſideration were all of opinion, that the juſtices had gone too far; for their whole authority is under 18 *El. c.* 3. whereby they are only impowered to take order for the relief of the pariſh, and puniſhment of the offender; but have no power to acquit the party, or convict him finally: which appears likewiſe from their proceedings being in *Engliſh*, where they are not required to ſet out the evidence, or ſhew a ſummons. The ſeſſions indeed on 3 *Car.* 1. *c.* 4. § 15. may make a final order; and after a man is diſcharged by one ſeſſions, a ſubſequent ſeſſions cannot take it up again, as was held *Mich.* 13 *Geo.* 1. *Rex* v. *Tenant.* And it would be greatly inconvenient, the juſtices ſhould have ſuch a power; becauſe the pariſh cannot appeal: the defendant indeed may, not by virtue of expreſs words, but in conſequence of the clauſe about giving ſecurity to abide the order of ſeſſions, if the party does not ſubmit to the order of two juſtices. And though a man may hereby be liable to be harraſſed in being carried before ſeveral juſtices, that is a leſs evil than the other: and beſides, this court is open, if any thing ſhould be done to the manifeſt oppreſſion of the party. The order was quaſhed.

Ante 716.

Dominus Rex *verſ.* Davis and Goſling.

Of the power of the ſeſſions as to conſtables. Caſ. Temp. Hardw. 269. S. C. more full. (1).

THE ſeſſions of *Monmouthſhire* made an order, reciting that *Ablard* and *Evans* had complained, that they had ſerved as conſtables of *Chepſtow* a year, and that though four perſons were returned by the homage to the ſteward, he had appointed no new ones; and therefore they prayed to be diſcharged, whereupon it is ordered that the defendants be appointed in their ſtead.

And upon conſidering the ſtatute 13 & 14 *Car.* 2. *c.* 12. which only impowers the ſeſſions to appoint conſtables, until the Lord ſhall hold a court; this order was quaſhed, becauſe it was in the disjunctive, for a year, or until others were choſen. Beſides, there was no adjudication that the others had ſerved a year.

(1) It appears from this report that there were two other exceptions, 1. That it was not ſaid that the perſons thus appointed were inhabitants of *Chepſtow*, 2. That no particular Juſtice is appointed for them to take the oath of office before. *All.* 78. 5 *Mod.* 131. But the court gave no opinion upon theſe objections but quaſhed the order for being in the disjunctive. 2 *Hawk. P. C. c.* 10. *ſ.* 49. *p.* 103.

[1051]

Cooper *verſ.* Le Blanc. At Guildhall.

Where a man has owned his hand to an indorſement he ſhall not ſet up a defence of forgery by ſimilitude. Ann. 295. S. C.

THE defendant was ſued as indorſor of a note. And it was proved, that a diſcounter ſent the note to the defendant, who looked on it, and ſaid it was his hand, and the note (which had ſome months to run) would be paid when due. The Chief Juſtice refuſed to let the defendant in to ſhew forgery by ſimilitude of hands (1), ſince it would tend to deſtroy all negotiation of notes and bills. But he ſeemed inclined to allow proof of actual forgery, if the defendant could have ſhewn it (2), which he could not. And the plaintiff obtained a verdict.

(1) *Bull. L. N. P.* 236.

(2) *Jennings* v. *Fowler*, *ante* 946. and the authorities cited in the note are *contra* to this *dictum*.

Barker *verf.* Sir Wolfton Dixie.

IN cafe for a malicious profecution of an indictment for felony, the jury found for the plaintiff, and gave 5 *s.* damages. And upon motion for a new trial on account of the fmallnefs of damages, the court held there could be no new trial on that account: for this was not a falfe verdict, as finding for the defendant would be, and would fubject them to an attaint; whereas they having found rightly for the plaintiff, no attaint would lie. And new trials came in the room only of attaints, as a more expeditious and eafy remedy.

No new trial for fmallnefs of damages. Andr. 261. n. a. S. C. Salk. 647. Ante 425, 940.

Kynafton *verf.* the Mayor, Aldermen and Affiftants of Shrewfbury.

TO a *mandamus* to reftore the plaintiff to the office of alderman it was returned, that at an affembly held fuch a day the plaintiff was for being abfent three years removed. And upon a traverfe of every part of the return, a fpecial verdict was found as to fome points which are not neceffary to be ftated, in as much as no opinion was given upon any but one, which was this. The removal was not upon a charter day, fo a fummons of an affembly was neceffary: the mayor gave orders for a fummons of all the members, but the ferjeant being informed and believing that one of the aldermen was out of fummons, neglected to give him notice, though he had a houfe and family in the town, and accordingly returned him out of fummons. And upon this part of the cafe the court was of opinion, it was not a regular affembly, for every member fhould be fummoned; and he has a right to debate as well as vote. And this point has been fo often fettled, that it is not now to be made a queftion. And by the fame reafon that the omitting to fummons one man may be excufed, the omiffion of a greater number may be paffed over.

If one member be omitted to be fummoned to a corporate affembly, the act is void (1). 4 Bro. Par. Ca. 271. Viner vol. 14. p. 583. c. 4. Caf. Temp. Hardw. 147. 2 Barn. B. R. 394. S. C. Ancr. 171, 360. S. C. S. P. Ib. 85, 104. But not S. P.

[1052]

Whereupon a rule was pronounced for a peremptory *mandamus*. And the plaintiff prepared to enter up a judgment for his damages and cofts, when it was found, that at the trial there was an omiffion of damages, and confequently there could be no judgment for cofts.

(1) *Vide Sir Chriftopher Mufgrave* v. *Nevinfon, ante* 584.

To

Where on trying a traverse to a return no damages are given, this cannot be supplied by writ of inquiry. Ante 1021. And if no damages are given no judgment can be entred. Neither can a waiver of them by the plaintiff set it right. 3 Com. Dig. Damages. (E. 1.) 344. (E. 8.) 350. If no damages are affessed upon such a traverse the defendants would be subject to an action for a false return.

To supply this defect the court was moved for a writ of inquiry. And *Cro. Car.* 143. and the cases of *quare impedit* and dower were cited, where damages not being the *git* of the action, the want of them may be supplied by writ of inquiry.

To this it was answered, and resolved by the court, that the rule laid down in *Cheyney's* case, 10 *Co.* is right, that where the jury are charged with a matter for which an attaint will lie if they give a false verdict, it can never be supplied by writ of inquiry, but must be by *venire facias de novo*, and so is *Salk.* 205. 5 *Mod.* 118.

By the statute 9 *Ann. c.* 20. this traverse is given in the room of an action for a false return: and as there it cannot be said the damages are collateral, so neither can it here; for they are consequent upon the issue, and as much within the charge of the jury. No one can doubt, but that if in an action for a false return damages had not been given, they could not be supplied by a writ of inquiry. All the cases of replevins upon the statute 17 *Car.* 2. *c.* 7. are in point as to that. 1 *Sid.* 380. *Raym.* 170. 1 *Vent.* 40. 2 *Keb.* 408. *Tucker* v. *Stevens in C. B. Trin.* 6. *Geo.* 1. Here it ought to be by the same jury, and there is no difference between a special and a general verdict. The plaintiff's counsel will therefore consider what to do, or pray.

And a writ of error being then depending in Parliament, it was not thought advisable to pray a *venire facias de novo*, but to consider of some form of a judgment to be entered up, in order to carry to the Lords. And the judgment that was entered was, "It is considered by the court, that the return is not sufficient "in law to bar or preclude the said *Corbet Kynaston* from being "restored to the said place or office of one of the aldermen of "the said town, and that the said return for the reasons afore-"said be disallowed and quashed."

And thereupon the cause was argued at the bar of the House of Lords, where no opinion was given upon the points of the special verdict, but a judgment pronounced for remitting the record to *B. R.* who were directed to award a *venire facias de novo*. There were three Judges present, C. J. *Willes*, J. *Denton*, and B. *Thompson*, to whom two questions were put.

[1053]

1. Whether there being no damages, any judgment could be entered. To which they answered that there could not; and declared that no waiver or *remittit* of damages below could have set this right, for then there would be nothing to give judgment for, the entry being only a judgment for damages and costs, and

e peremptory *mandamus* goes by rule for him for whom ent is given, which are the words of the ſtatute.

: ſecond queſtion put to the Judges was, whether as no es are given, the plaintiffs in error would not be ſubject to on, which would be a double vexation. As to this their n was, that an action might be brought, the ſtatute only it away in caſe damages are given upon trying the tra-

: judgment was reverſed, and a *venire facias de novo* directoe awarded by *B. R.* (2).

Vide Haſwell v. *Chalie, poſt.* *Parker* v. *Wells*, 1 *Cooke's Law.* 166. 1 *Term Rep.* *Lickbarrow* v. *Maſon*, 5 *Rep.* 367. In which caſes uſe of Lords have directed *e de novo* to *be awarded* by In *Street* v. *Hopkinſon, poſt.* *Caſ. Temp. Hard.* 345. which was a writ of error he *Common Pleas*, the court *'s Bench* were of opinion eycould not award a *venire* for that would be for *B. R.* inue and transfer the progs into their court. But in *d* v. *Goodright, Cowp.* 91. *Mansfield* declared, that the of *B. R.* have power to ſuch a *venire* in a writ of rom the *Common Pleas*, and in *Grant* v. *Aſtle, Doug.* 722. they did award it, as alſo in *Bent* v. *Baker*, 3 *Term Rep.* 37. See alſo *Sutton* v. *Johnſton*, 1 *Term Rep.* 528. and the caſes collected in note (*b*). In *Trevor* v. *Wall*, *B. R.* refuſed to award ſuch a writ upon the ground that the proceedings upon which error was brought originated *in an inferior court.* 1 *Term Rep.* 151. But in *Davis* v. *Pierce*, 2 *Term Rep.* 125. where a bill of exceptions had been tendered in the court of Great Seſſions in *Wales*; and the proceedings were removed by writ of error into *B. R.* that court being of opinion that the bill was properly tendered, awarded a *venire de novo* into the next *Engliſh* county.

Michaelmas Term

10 Georgii 2 Regis. In B. R.

Philip *Lord* Hardwicke, *Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq;*

John Willes, *Esq;* *Attorney General.*

Dudley Ryder, *Esq;* *Solicitor General.*

Smalt *verf.* Whitmill.

There muft be perfonal fervice of a witnefs to warrant an attachment. Ante 810. Poft. 1150.

AN attachment was moved for againft a witnefs, for not attending, being fubpœnaed, and having a fhilling left. But it appearing not to be perfonal fervice, the court held it not fufficient to warrant a proceeding criminally againft him (1); whether it would do in an action, they would not declare. It was alfo faid, that though a fhilling is what is conftantly given with a *fubpœna*, yet if the witnefs comes far, there ought to be a tender of reafonable charges.

(1) *Wakefield's cafe*, *Caf. Temp. Hardw.* 313. S. P.

Cock *verf.* Wortham.

Servant a witnefs in action by the mafter *per quod, &c.*

IT was held, that in an action brought by a father for deflowering his daughter, *per quod* he loft her fervice; the daughter might be examined as a witnefs for the plaintiff (1). *Ante* 414, 595, 944.

(1) *Tullidge* v. *Wade*, 3 *Wilf.* 18. S. P. But fhe muft not give in evidence a promife of marriage. *Ib.*

Street *verſ.* Hopkinſon et al'.

A Writ of error was brought, *tam in redditione judicii* againſt the teſtator, *quam in adjudicatione executionis* againſt the executors. As to the principal judgment, the defendant in error pleaded the ſtatute of limitations, and prayed that the judgment be affirmed. As to the award of execution, *in nullo eſt erratum* was pleaded. And that appeared to be in a *ſcire facias* againſt two executors, one of whom pleaded *ne unques executor*, and the other pleaded payment by the teſtator: and upon this plea there was a verdict againſt it, but no verdict as to the other, and then follows the award of execution.

Upon pleading the ſtatute of limitations in error, the judgment is to bar the plaintiff of his writ. Caſ. Temp Hardw. 345. S. C. Ante 127, 439, 683.

As to the principal judgment, the only doubt was, whether as the defendant in error had concluded with a prayer that the judgment be affirmed, the court could give the proper judgment, which was, that the plaintiffs be barred of their writ of error. But the court held, that they were not bound by the prayer of an improper judgment, and therefore pronounced the rule, that the plaintiff in error ſhould be barred.

And as to the award of execution, they were of opinion it was wrong, and that not being in the ſame court, they could not award a *venire facias de novo* (1): and this being a diſtinct judgment, might be reverſed without affecting the other. And it was reverſed accordingly. The caſes cited upon the firſt point were *Show.* 50. *Carth.* 369, 370. *Lutw.* 1386. 2 *Lev.* 58. And on the ſecond point, 1 *Roll. Abr.* 803. 1 *Inſt.* 127. 3 *Salk.* 372. *Cattle* v. *Andrews*, *Hil.* 5 *W.* & *M. rot.* 826. *in B. R.* *Cumb.* 259. *Salk.* 4, 363.

There can no *venire facias de novo* be awarded on error.

(1) *Ante* 1052. and the caſes cited in the note *contra*.

Dodſon *verſ.* Taylor.

THE cauſe was tried by proviſo, and the planitiff nonſuited. But that nonſuit was ſet aſide, for want of a rule being given in the office, the form of which is, *Fiat niſi prius per proviſo ſi querens fecerit defaltam.* And this was agreed to be the old practice, but generally diſcontinued. *Stiles* and *Lilly's Regiſters* were cited, and the nonſuit ſet aſide (1).

There muſt be a rule before any trial by proviſo.

(1) *Proude* v. *Willimote*, 1 *Barnard. B. R.* 18. *acc.* But it is ſufficient if the defendant obtain this rule any time before the trial. *King* v. *Pippet*, 1 *Term Rep.* 695.

Thruftout, on the demife of Turner, *verf.* Grey et al'.

Court cannot ftay proceedings in ejectment, though leffor's title is at an end.
Caf. Temp. Hardw. 165. but not S. P.
5 Com. Dig. Pleader. (2 Z. 4.) 684.

UPON a fpecial verdict in ejectment, it appeared that the leffor of the plaintiff claimed as tenant for life: and upon an affidavit of his death, it was moved that all proceedings might ftay, fince it could fignify nothing to argue it upon the merits. *Sed per curiam*, Though the poffeffion cannot be obtained, yet the plaintiff has a right to proceed for damages and cofts: all we can do is, to oblige him to give fecurity for cofts, now the leffor is dead; as we do in the cafe of infant leffors, who cannot enter into the common rule.

Wefton *verf.* Pool.

The executrix of an attorney pays no cofts, tho' a fixth part of the bill is taken off.

3 M. & S. 294
3 M. & C. 225

AN attorney delivered his bill, and after his death application was made to tax it, and above a fixth part was ftruck off: it was moved that the executrix might pay the cofts: but the court held fhe fhould not, for the words of the act 1 *Geo.* 2. *c.* 23. § 22. impofe them upon the attorney or folicitor only, and the executrix is not to blame, if fhe ftands upon his bill, or makes out one from his books (1).

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(1) *Dutton* v. *Agate*, *Say. L. of Cofts*, 327. S. P.

Middleton et ux' *verf.* Croft.

Of the jurifdiction of the fpiritual court as to clandeftine marriages.
2 Barn. B. R. 351.
2 Kely. 148.
2 Atk. 650.
Andr. 57.
Cunn. 35, 114.
Ann. 57, 327, 395.
4 Vin. Abr. 320. pl. 14. S. C.

IN prohibition the plaintiff declares, that by the ftatute 7 & 8 *W.* 3. *c.* 35. a penalty of 10 *l.* is inflicted on every man who marries without licence or banns, notwithftanding which he and his wife had been cited into the fpiritual court, for being married before eight in the morning, without licence or banns, contrary to the canon, which fixes the time to be between eight and twelve, and requires a licence or banns: that they are lay perfons, not bound by the canon, and therefore pray a prohibition. The defendant as to the contempt pleads Not guilty, and for a confultation demurs.

And after feveral arguments at bar, the Chief Juftice this term delivered the refolution of the court.

Lord *Hardwicke*, In this cafe three queftions have been made. 1. Whether by the canons of 1603. lay perfons are punifhable

for a clandeftine marriage. 2. If not: whether by the canon law anciently received the fpiritual court has a jurifdiction to proceed for a clandeftine marriage. And, 3. Suppofing they have a jurifdiction either way, whether that jurifdiction is taken away by the act of Parliament, which has inflicted the penalty of 10*l*. [1057]

As to the firft of thefe, two things are confiderable, 1. Whether the laity are within the words of thofe canons. 2. Whether there was a proper authority to bind the laity, if the words do extend to them.

And as to the queftion, whether the words take them in: thofe which any way relate to this matter are the 62d, 101ft, 102d, 103d, and 104th canons: in the four firft of which there are no words that affect the parties contracting: indeed in the 104th there are words relating to the married perfons; but they relate only to marriages under void or irregular licences, which is not this cafe: and therefore upon this point we are all of opinion, that lay perfons are not within the words of the canons of 1603.

The next point is, whether the makers of thofe canons had a power to bind the laity. They were made by the bifhops and clergy in convocation affembled, by virtue of the King's writ, and confirmed by his charter under the great feal.

The general opinion has been, that thefe having never been received or confirmed in Parliament, cannot bind the laity. And my brother *Wright* in his argument feemed to admit it, by putting the cafe upon the foot of the old canon law: but as the other counfel who argued on that fide did not give it up, it may be proper to fettle it: and we are all of opinion, that *proprio vigore*, the canons of 1603. do not bind the laity; I fay *proprio vigore*, becaufe fome of them are only declaratory of the ancient canon law.

They who look into *Spelman*'s collection, will find much matter in the ancient councils, that may ferve for illuftration and ornament; but as thofe were often mixed affemblies, compofed of the nobility, legantine authority, and papal ufurpation, little is to be found as to the merits of the queftion, whether the laity are bound or not.

The only proper way therefore is, to confider this queftion upon the foot of the ancient conftitution. No new law can be introduced here, but is the work, and has the confent of the three eftates of the realm: and fo it is declared in the *Parliament*

Roll 4 *Hen*. 5. *p*. 2. *n°*. 19. 12 *Co*. 74. 4 *Inst*. 1. For they representing the whole realm, every man is by representation a party. In the making of canons, the Royal assent is all the share that the Legislature has in them: for the Lords and Com-
[1058] mons are excluded, and not represented. It was said indeed by Dr. *Andrews*, that even in Parliament there was not an actual representation of all orders and degrees of men, there being more subjects who do not vote in the election, than who do. But that does not make it cease to be a representation: it was impossible that all could join in the election, and therefore our constitution has fixed it in the more worthy, who have a right to bind the rest. The learned Doctor indeed advanced a notion, that the parson represents the parish: but how can that be, when we all know the parson is not elected by them? The writ is *convocari facias totum clerum*, and the premonition is, that archdeacons and deans shall come in person, and the rest by their
4 Inst. 322. representatives. These shew plainly, that the clergy only are called, and that the proctors are chosen to represent the clergy only. Hence arises the distinction between canons made in ancient councils confirmed by the empire after it became Christian, and those made here. The Emperor, according to *Justinian* and the *Digest*, had a legislative power; and when they received his confirmation, they had their full authority. But that is not the case here: the crown has not the full legislative power, and it is therefore rightly said in *Salk*. 673. The King's consent to a canon *in re ecclesiastica* makes it a law to bind the clergy, but not the laity: and no one can say, that the consent of the people is included in the Royal confirmation.

Another argument is, that by our constitution taxes and new laws are co-extensive: the Parliament lay taxes on all the people; but the clergy never pretended to tax any but themselves. And it seems very absurd, that when they cannot raise money upon the laity, they should still have it in their power to enact new laws, whereby their liberty and property may be affected.

In all the acts since the reformation for confirming forms of prayer, and other ecclesiastical constitutions, the preambles shew that the clergy in convocation were only considered as the propounders of them. It was said, that this did not give being to them as laws, to bind the laity, but was only to enforce them by the addition of civil penalties. But that is not the only reason, though it is one. The true use of these confirmations in Parliament was the extension of them over the laity, who would otherwise not be bound. It has been said, that at least they should bind *in re ecclesiastica*: but this proves a great deal too much. There are many things of an ecclesiastical nature, which

which no canon can touch, as the cafe of tithes, the degrees of confanguinity, and the operation of adminiftrations: and if this argument would hold, they might overturn the common law as to the heirfhip of lands, and the divifion of perfonal eftates, which would never be endured. Thefe are matters that have always been regulated by the legiflature, witnefs the ftatutes of [1059] 32 *Hen.* 8. *c.* 28. 21 *Hen.* 8. *c.* 5. and 22 & 23 *Car.* 2. *c.* 10. If they were thought to have power in thefe matters, how came the bifhops, at the time of making the ftatute of *Merton*, *c.* 9. to apply for a declaration touching the legitimacy of children born before lawful marriage?

As to the cafe cited from 1 *Roll. Abr.* 909. *I.* 5. that *bona notabilia* were by a canon fettled at 5 *l.* in King *James* the Firft's time. In the firft place it is a miftake, for there were canons fet it at that, long before even *Perkins*, who § 489. notwithftanding eftimates them at 40 *s.* *Rolle* himfelf adds a *dubitatur.* And after all, what is this more than a regulation of fees amongft themfelves? 8 *Co.* 135. *a.* is a report of the fame cafe, and he fays nothing of this; fo that at moft it is but a loofe faying in an abridgment.

In the ftatute law there is nothing exprefs upon this point; but there are ftrong implications. The 25 *Hen.* 8. *c.* 19. impowers commiffioners to infpect the canons: and in *Raftal's* ftatutes there are feveral acts fubfequent for that purpofe. And it is obfervable, that the ftatute of 25 *Hen.* 8. begins with the fubmiffion of the clergy *in verbo facerdotii*; and though nothing is faid as to the perfons to be bound, yet it appears the clergy thought it proper to take along with them the confent of the laity, to abrogate and alter canons: and every body muft fee, that if this authority had been executed, the fyftem would have derived its binding force from the grantors.

I come next to confider the judicial authorities. The firft is the prior of *Leed's* cafe, 20 *Hen.* 6. 12. *b.* *Brooke Ordinary* 1. where it is exprefsly laid down, that the ordinary has power to make holidays, fafting days, and conftitutions provincial, *de lyer le clergy, mes nemy de lyer le temporalty.*

The next cafe *Mich.* 24 *Ed.* 4. 44. *b.* where though there is fome difference in opinion upon the power of the convocation, yet as to the point now in queftion it is agreed on both fides. In 5 *Co.* 32. *b.* *Cawdrie's* cafe, my Lord *Coke* lays it down, that by general confent of the whole realm canons may be made or altered.

In *Mo.* 755. *Plowd.* 43. 2 *Co.* 37. the queſtion propoſed is, whether the deprivation of the puritan miniſters was lawful; and the Judges ſaid it was, becauſe the King had delegated them full power, as he might.

That a parliamentary confirmation is neceſſary, ſee *Carth.* 485. *Salk.* 134. And I have ſeen two manuſcript reports of [1060.] that caſe in *Carthew*, by my Lord *Raymond* and Chief Juſtice *Eyre* both of which agree with the report. Ld. Raym. 447.

In *Mod. Caſ.* 188. in a ſuit for not coming to church, *Holt* ſays, if you have a canon before 1603. it may bind: and in *Davis*'s caſe, *Mich.* 5 *Geo.* 1. *in C. B. King* C. J. laid it down as a prevailing opinion, that the canons of 1603, did not bind the laity.

Having thus conſidered the caſes which warrant our opinion, let us now take notice of the three caſes relied on againſt it.

The firſt is in *Mo.* 781. a very extraordinary caſe, and no precedent, for there both were clerks: and though it is laid down pretty ſtrongly, as if a biſhop could bind his dioceſe; yet it is not ſaid, that he could bind the laity therein.

The ſecond caſe is *Vaughan* 327. and what he ſays there is certainly right, that a *lawful canon* is the law of the kingdom, as well as an act of Parliament. But does he define what is a lawful canon, or that it will bind the laity without their conſent? On the contrary in the very next paragraph he ſpeaks of a canon as warranted by act of Parliament.

And as to the caſe in 2 *Vent.* 41. where *Vaughan* ſays, Though no canons are confirmed by Parliament, yet they are the laws which govern in eccleſiaſtical affairs: I obſerve that was only a *dictum* upon a motion, and was at the time expreſsly contradicted by J. *Tyrrell*, who holds that the King and Convocation without the Parliament cannot make any canons, which ſhall bind the laity.

Upon this ſtate therefore of the authorities on each ſide of the queſtion, it is eaſy to ſee which preponderate; the three laſt reſolve all into the ſingle opinion of C. J. *Vaughan*, to which I oppoſe all the reſt, and lay it down as our conſiderate opinion, that the canons of 1603. do not *proprio vigore* bind the laity.

The ſecond point I propoſed to conſider was, whether laying aſide the canons of 1603, the ſpiritual court has any juriſdiction under

under the former canon law received and allowed, to proceed againſt the plaintiffs for a clandeſtine marriage. And we are all of opinion, that in this reſpect their juriſdiction is well founded.

It has been already proved, that the received canons bind the laity; and this appears by our ſtatute law, 25 *H.* 8. *c.* 21. in the preamble, and 35 *H.* 8. *c.* 16. which continues the force of canons accuſtomed and uſed: and here reſts the eccleſiaſtical power. My Lord *Hale* in a manuſcript I have ſeen of his, ſays [1061] it was firſt introduced by external power and diſcipline allowed or tacitly ſubmitted to, which introduced it as a cuſtom: it therefore only remains to inquire, whether the canons againſt clandeſtine marriages have been received or not. In the *Decretal, lib.* 4. *tit.* 3. *c.* 3. is one, which was adopted here, as appears by *Linwoode*, and it runs *quod hujuſmodi contrahentes excommunicentur.*

It was ſaid that in the books at *Lambeth* there are innumerable inſtances of ſuch proceedings; and I believe there are, but as they have paſſed *ſub ſilentio*, let us rather look out for a judicial deciſion, and I have one; it is in Sir *W. Jones* 257. where it is held, that if any marry without banns or licence, they are citable for it into the eccleſiaſtical court, and no prohibition ſhall go.

This caſe therefore is in point, and uncontradicted. And indeed is not to be imagined, that ſo great an evil as clandeſtine marriages was unpuniſhable in the parties, till the ſtatute of *W.* 3. inflicted the penalty of 10*l.* upon the huſband.

And this brings me to the third and laſt point I propoſed to conſider, which is, whether the ſtatute of 7 & 8 *W.* 3. has by inflicting that penalty, taken away the juriſdiction of the ſpiritual court.

Before I conſider this I would make two obſervations: 1. That though this was for but a ſhort time at firſt, yet it is continued by ſubſequent laws, the 8 & 9 *W.* 3. *c.* 19. and the 5 *Ann. c.* 19. § 36. for ninety-ſix years. 2. That the penalty is only upon the man, ſo that as to the woman ſhe indiſputably remains ſubject to the eccleſiaſtical juriſdiction.

But we are all of opinion, that as to the man too the juriſdiction was not taken away. In 2 *Vent.* 41. it is held, that their juriſdiction was not taken away by the conventicle act. So in 2 *Lev.* 222. Sir *T. Jones* 131. as to teaching ſchool. Inded in

Carth. 464. there was a prohibition, upon the maxim, *quod nemo bis puniri debet pro uno et eodem delicto.* And that to be sure is a strong objection, if the penalty, and the suit in the spiritual court, were *eo nomine*, and the intent the same.

But this is a sort of middle case, where the penalty is not given as the punishment for the offence, but only to secure the payment of the stamp duty. For it is introduced by the words, *and for the better collecting*, &c. It is therefore a proceeding *diverso intuitu*, as upon the statute of *Articuli Cleri*.

[1062] This is stronger than the cases of fathers and mothers of bastards on 18 *Eliz. c.* 3. where there is a punishment for the act of lewdness, and yet the spiritual court proceeds hand in hand for incontinence.

2 Inst. 488. Godb. 247. 3 Burr. 1679. 2 Term Rep. 270. Rex v. Bowen, 5 Term Rep.

Here one jurisdiction punishes for the criminal act itself, and the other for an intended fraud upon the revenue.

The rubrick ordains the publication of banns, and that is confirmed by 1 *Eliz. c.* 2. § 16. and the act of uniformity 13 & 14 *Car.* 2. *c.* 4. the consequence of which is, that the rubrick binds the laity.

And upon this a new point may arise, whether supposing the statute was a repeal of the ancient jurisdiction; yet it can abrogate it, where it is confirmed by Parliament. Now every body knows, a new penalty is no repeal of a former, without express words of repeal: without these, both may stand, and the last be considered only as a further penalty.

There is nothing of that in this statute, and therefore we may warrantably determine, that the 7 & 8 *W.* 3, has not abrogated the ancient jurisdiction in the case of a clandestine marriage.

I have thus largely gone through the several questions which have arisen in this case, that as we are all sensible, the evil of clandestine marriages is a growing one, it may be clearly understood, upon what foot the remedy stands.

And upon the whole we are of opinion, that there ought to go a consultation as to all the points of the suit below but one, which is the hour at which the marriage is alleged to have been had. Now as the confining marriages to be between eight and twelve in the morning, is only a regulation introduced by the canons of 1603, which we have determined do not bind in this case; it is of consequence, that the spiritual court be restrained from making that any ground of their proceedings; in this respect

ſpect therefore the prohibition muſt ſtand, and a conſultation muſt go for the reſt.

After pronouncing this judgment, the plaintiff in the prohibition moved for coſts, having prevailed in one point, and the ſtatute of 8 & 9 *W.* 3. *c.* 11. § 3. giving coſts in all ſuits upon prohibitions to the plaintiff obtaining judgment, or any award of execution. And it was prayed that they might be taxed from the time of the firſt motion, according to ſeveral determinations: and this laſt was acquieſced in, if the court ſhould be of opinion for coſts; as to which it was ſaid that the hour was not the *git* of the proceedings in the ſpiritual court, but only a circumſtance amongſt others to prove it a clandeſtine marriage: and that it would be very hard, that they who had prevailed upon the merits, ſhould pay coſts. *Sed per curiam,* The words of the act are not to be got over, which give coſts to the plaintiff, if he obtains any judgment: and this matter was under conſideration in the Houſe of Lords in Dr. *Bentley's* caſe, where the prohibition ſtood as to ſome articles, and there went a conſultation for the reſt: to be ſure it will be conſidered in the *quantum,* but we cannot deny coſts.

If the plaintiff in prohibition prevails in any part, he ſhall have coſts (1). Ante 82.

[1063] Ante 82.

Ante 913.

However no rule was made for coſts, it being objected, that the huſband died before judgment, and the 8 & 9 *W.* 3. *c.* 11. § 7. not extending to this caſe, which was a ſuit by huſband and wife, who are but one perſon, and conſequently his death abates the ſuit. As to which point (being of ſome nicety) the court ordered it to be ſpoke to; but I never heard of it afterwards, and believe the parties agreed to waive any further proceedings againſt the wife in the ſpiritual court, and ſhe to drop her pretenſions to coſts.

N. B. Mich. 11 Geo. 2. *it was reſumed; and the court held, the ſuit was not abated at common law; or if it was, yet the ſtatute* 8 & 9 Will. 3. c. 11. *had helped it: and therefore a rule was made for taxing coſts for the plaintiff in prohibition.* And. 57.

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(1) *Malton* v. *Acklam,* S. P. in *C. B.* where a verdict was found for the defendant as to part of the matter in iſſue, and a conſultation awarded for the reſt. *Barnes,* 138.

Barnes *verſ.* Peterſon.

AN ejectment was brought for lands in *Norfolk,* and *inter alia* for five acres of *Alder Carr:* and it was moved to be too incertain; but upon the certificate of *Norfolk* men from the bar, that it is a term well known there, and ſignifies the ſame as *alnetum,* which is mentioned by Lord *Coke,* and means land covered with alders; the court held it well enough, alluding to the

Ejectment lies for Alder Carr. 5 Com. Dig. Pleader,(2 Z. 1 676. poſt. 108

Ante 71. the case of Lord *Kildare* and *Fisher*, where it was held to lie for *mountain* in *Ireland*; and *Lee* J. said, that in *Yorkshire* it is common to bring ejectment for cattle gates.

Blackwood *vers.* the South-sea Company.

It is no objection to proceeding on error that the return is not signed by the Chief Justice. Cas. temp. Hard. 344. S. C. Yelv. 34. Salk. 192.

UPON error from *C. B.* it was objected, that the return was not signed by C. J. *Eyre*; and therefore it was moved to stay the proceedings, the constant practice being, for the Chief Justice to set his hand under the answer on the back of the writ. *Sed per curiam*, At common law it was not required that officers should sign returns; and the statute of *York* makes it necessary only for sheriffs: and though this may be matter of irregularity in *C. B.* we can take no notice of it, but must proceed upon the record, which is indorsed *responsio Roberti Eyre* [1064] *militis capitalis justiciarii infranominati*, which for any thing we know to the contrary may be the hand-writing of the Chief Justice. The writ requires the record to be sent *sub sigillo*, which is never practised. The judgment was affirmed.

Post. 1080.

Savage *vers.* Dent.

Leaving beer in a cellar is keeping the possession. Bull. L. N. P. 97. S. C.

THE lessee of a publick house took another, and removed his goods and family, but left beer in the cellar. And there being rent in arrear, the landlord sealed a lease as on a vacant possession, delivered an ejectment, and signed judgment; which was set aside, the lessee still continuing in possession. And a case was mentioned, where leaving hay in a barn at *Hendon* was held to be keeping possession. It further appeared in this case, that the attorney for the plaintiff knew whither the lessee removed, and might have served him personally, which is not necessary to be done upon the premisses (1). And in the case of renting ground, to which there is no house or barn, if it is known where the tenant lives, he must be served.

(1) *Jones on the demise of Griffiths* v. *March*, 4 *Term Rep.* 464. S. P.

Honeycomb ex demiss' Halpen et' ux *vers.* Waldron et al', In Middlesex.

Registring an assignment is not registring the lease.

THE defendant claimed under a lease made in 1730, by Lord *Grandison*, which was soon after mortgaged, and in 1731, sold out and out to the defendant. The original lease was not registred, but the first mortgage of it, and the defend-

ant's

ant's purchase were. And it not being a lease at a rack rent, the question was, whether this was a registry within the meaning of 7 *Ann.* *c.* 20. And the Chief Justice held it not to be sufficient; for the act says, the deed under which the party claims, with the witnesses' names, shall be registred; and of this a subsequent purchaser can have no notice by the bare registry of the assignment, and it is also required that the original be produced to the officer. 7 Ann. c. 20.

Wickham *verf.* Hobart. [1065]

An attorney though servant to a Peer has no privilege of Parliament. Cas. temp. Hard. 348. S. C. 4 Bac. Abr. 290.

THE sheriff of *Middlesex* moved to discharge a rule to return his writ, upon affidavit that the defendant was a menial servant of the lord *Say and Seale*, and that my lord had claimed him upon his being arrested, upon which he had discharged him. But it appearing to the court, that the defendant was an attorney, and that it was a standing order of the House of Lords, 24 *March* 1696, that no common attorney or solicitor, though employed by a Peer, shall have privilege; the court refused the motion, and ordered the sheriff to return his writ.

Boyfield *verf.* Brown. At Guildhall.

Where salvage falls short of the freight it is a total loss.

UPON the execution of a writ of inquiry before the Chief Justice, it appeared that the defendant was an insurer to 200*l.* upon corn (1), the value of which was 217*l.* that the corn was so damaged in the voyage, that it sold only for 67*l.* and the freight came to 80*l.* And upon this the question was, whether as the freight, which the plaintiff was obliged to pay, exceeded the salvage; this was not to be considered as a total loss.

And for the plaintiff it was insisted, that he ought not to be in a worse condition, than if his corn had gone to the bottom of the sea: for then he would have had no freight to pay, and now that the voyage has been performed, whereby the freight is become due, he has a right to apply the salvage to discharge that.

(1) In the year 1749, subsequent to this determination, the *London* underwriters introduced a memorandum at the foot of their policy by which it is declared that "corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded;" and in *Mason* v. *Skurray*, *Sittings after Hil. Term* 1780. *Park on Mar. Insur.* 115. a loss similar to the present was held to be a *partial one*, and to come within that exception. *Vide* also *Bailie* v. *Modigliani*, *ibid.* 117.

It

It was proved to be the ufage, where the falvage exceeds the freight, to deduct the freight out of the falvage and make up the lofs upon the difference.

For the defendant it was infifted, that as his infurance was upon the corn, and the whole did not perifh; he ought in making up the lofs to deduct the falvage: but no inftance could be fhewn on either fide of an adjuftment, where the freight exceeded the falvage.

The Chief Juftice was of opinion, that within the reafon of deducting the freight when the falvage exceeds it, the plaintiff was in this cafe, wherein it fell fhort, intitled to have it confidered as a total lofs. And the jury found for the plaintiff accordingly.

[1066]

Dominus Rex *verf.* Morgan. At Guildhall.

12 Geo. 1. c. 29. Though the time in a temporary law is expired, yet if it be continued, facts may be laid to be done by virtue of the firft law. Lutw. 215. 221.

IN an indictment for perjury in an affidavit to hold to bail, it was laid to have been taken by virtue of 12 *Geo.* 1. *c.* 29. which was a temporary law for five years, and after continued by 5 *Geo.* 2. *c.* 27. which has alfo altered it in fome refpects. And for the defendant it was infifted, that it fhould have been laid to have been taken by virtue of the latter act; efpecially as it is not barely an act for continuance, but has made feveral alterations in the former. *Sed per* Chief Juftice, When an act is continued, every body is eftopped to fay it is not in force. And as it is not altered in this refpect, it is but a common continuance *quoad hoc.* So the defendant was convicted.

Between the Parifhes of St. Nicholas *and* St. Peter in Ipfwich.

An apprentice bound for four years only, gains a fettlement. Burr. Sett. Ca. 91. more full, and Seff. Ca. Ed. 1750. vol. 2. p. 231. No. 162. S. C. Caf. temp. Hard. 323. S. C.

UPON a fpecial order of feffions, it was ftated, that *James Blythe* in 1706, was put apprentice in *St. Peters* for four years by indenture; and that he lived there, and ferved the time; but in as much as he was not bound for feven years, as 5 *Eliz. c.* 4. requires, the feffions adjudge it no fettlement.

And the 41ft fection of that ftatute was infifted on, to fupport the order: which declares, "That all indentures, covenants, "bargains, of or for the having or taking any apprentice, other"wife to be made or taken, than is by that ftatute ordained, "fhall be clearly void in law to all intents and purpofes." And one of the former regulations is, that the binding fhall be for

feven

ſeven years. And the caſe of *Cureden* and *Laland* was relied on *Paſ.* 4 *Geo.* 2. where the apprenticeſhip was for ſeven years, but the indentures never ſtampt; and held to be no ſettlement, *Ante* 903.

But notwithſtanding this, the court was of opinion, here was a ſettlement; and quaſhed the order. It appears that between the 26th and 41ſt ſections, there are many regulations, what ſort of perſons ſhall take apprentices, and what not; which are never regarded. And it would be of miſchievous conſequence now, to refer this laſt ſection back to all the reſt. They ſaid the word *void* muſt be conſtrued *voidable*; as on the ſtatute *Weſtm.* 2. *finis ipſo jure ſit nullus*, it is yet a diſcontinuance. *Hob.* 166. And on 23 *H.* 6. *c.* 10. you muſt plead ſpecially, and cannot avoid a bail bond on *non eſt factum*. Here the in- [1067] denture has had its effect, and neither maſter nor ſervant have taken advantage of the objection: and as to the caſe of *Cureden* and *Laland* on 8 *Ann.* *c.* 9. *ſect.* 43. there were words prohibiting the giving the indenture in evidence; and admitting im- *Rex* v. *Holbeck*, proper evidence is always a ground to quaſh (1). *Burr. S. C.* 209. S. P.

And it was ſaid to be a vulgar error, to think the 13 & 14 *Car.* 2. *c.* 12. was the firſt act about ſettlements; for in *Raſtal*'s ſtatutes it appears, that ſo long ago as 27 *H.* 8. *c.* 25. and in 12 Ric. 2. c. 7. *Edward* the Sixth's time, there were laws to that purpoſe. 19 Hen. 7. c. 12. 22 Hen. 8. c. 12.

(1) The court in eſtabliſhing the diſtinction between theſe caſes alſo relied upon the words in the 39 ſect. of the ſtat. where ſpeaking of the duty not being paid, it not only ſays that the indentures ſhall be void, but adds, "and not available in any court or place, or to any purpoſe whatſoever."

Dominus Rex *verſ.* Eyre. In Canc.

TWO *ſignificavits* were quaſhed, being only ſaid to be in a *Excommunicato* cauſe which came by appeal concerning a matter merely *capiendo.* ſpiritual: for *per* Lord *Talbot*, we are not to lend our aſſiſtance, but where it appears clearly they have juriſdiction; and are not to truſt them to determine what is a matter merely ſpiritual. It is no more than ſaying, it is within their juriſdiction, which is never endured. In *Fowler*'s caſe in *Salk.* 293. it was *in cauſis jurium eccleſiaſticorum*, and held not ſufficient (1).

(1) *Vide Regina* v. *Doctor Watſon*, 2 *Ld. Raym.* 817. 2 *Burn's Eccl. Law* 226.

Hilary Term

10 Georgii 2 Regis. In B. R.

Philip *Lord* Hardwicke, *Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
William Lee, *Esq;*

Dudley Ryder, *Esq; Attorney General.*
John Strange, *Esq; Solicitor General.*

North *verf.* Wiggins.

Q. If an attachment goes absolutely where contemptuous words are sworn only by one witness. Salk. 84.

THE defendant on service of the process abused the officer, and spoke contemptuous words of the court. And on motion for an attachment at once, it was doubted, whether when such words are sworn by one person only, the rule should be absolute, or only to shew cause: the rule in Chancery requiring two affidavits, to deprive the party of the benefit of shewing cause. But in this case there being a supplemental affidavit, the point was not determined (1). However the Chief Justice said, he should be unwilling to establish a practice that would put it in the power of one hardy man, to hinder another of an opportunity of defending himself, before he was restrained of his liberty.

(1) *Vide Rex* v. *Kendrick. Say. Rep.* 114.

Dominus Rex *verf.* Webb.

Certiorari to *Old Bailey.* Ante 549. 583. 717. 1049.

A *Certiorari* was granted to the *Old Bailey* in perjury *ad instantiam defendentis*, on an affidavit that the prosecutor's attorney was under-sheriff of *Middlesex*, and attended the grand jury on finding the bill.

Dominus Rex *verf.* Inhabitantes de Glaffenby, in Com' Cumberland.

AFTER traverfe of a writ of *noctanter*, where the jury found 17*l.* damages, the queftion was, whether the profecutor could have cofts; he infifted that by the ftatute of *Gloucefter* cofts are given in all cafes where damages are recovered. On the contrary it was faid, this was a criminal proceeding, in which the inhabitants could recover no cofts if they are acquitted. That cofts are a penalty, and the acts given them to be taken ftrictly. *Salk.* 205. And of this opinion was the court, there being no inftance of cofts being given on thefe proceedings, where the inhabitants are brought in collaterally, on the jury's finding that the malefactors are unknown.

No cofts upon a writ of *noctanter.* Caf. temp. Hard. 355. more full.

Carth. 239. 242. Lutw. 141. 155.

Harris *verf.* Bernard.

THE plaintiff in an action againft the fheriff, defcribed a bill of *Middlefex* as the precept of the King: and on *nul tiel record*, it was objected, that it ought to be fet out as the precept of the court, the words being *preceptum eft vicecomiti*, as the award of the court.

A bill of *Middlefex* is well defcribed as the precept of the King.

E contra it was infifted, that in every *latitat* it is fet out with, "Whereas *We* lately commanded our fheriff:" And in 2 *Saund.* 52. 151. it is fet out in this manner. *Et per curiam*, Judgment *quod perfecit recordum.*

Dominus Rex *verf.* Robins.

UPON motion for a new trial on behalf of the defendant in an information in the nature of a *quo warranto* for the office of mayor of *Tintagel*, the queftion on which the defendant's title turned was, whether the former mayor had a right to name two elifors to return a jury, if the town-clerk, who might nominate one, was abfent or refufed. The fecond elifor nominated by the mayor was called as a witnefs, to prove the cuftom; and it was objected to his competency, that he having acted under fuch a nomination, was liable to an information, and therefore could not be examined. And Mr. Baron *Thompfon*, who tried the caufe in *Cornwal*, rejected him. It was now moved for a new trial, for that the objection went only to his credit: and 2 *Roll. Abr.* 685. *pl.* 3. was cited, where *A. B.* and *C.* were feverally indicted for perjury in proving a bond, and allowed to be witneffes for each other. 2 *Lev.* 231. 236. 2 *Sid.*

A corporator who has acted under a bare authority may be a witnefs to prove the ufage, under which he had been appointed. Bull. L. N. P. 291. S. C.

2 *Sid.* 109. *Salk.* 690. (1). *Et per curiam*, The boundaries between what goes to the credit, and what to the competency, are very nice, and the latter carried too far: in this case he was but an officer for the day, whose power has long since been at an end. It was a bare authority, and not an interest: and nothing is more common, than to examine former mayors as to the right, though there is no limitation to informations (2). We think this goes only to his credit, and there ought to be a new trial on payment of costs.

(1) *Et vide Gilb. Law of Evid.* 3 ed. 135. The opinion of *Ashhurst* J. in *Walton* v. *Shelley*, 1 *Term Rep.* 301—2. and *Rex* v. *Fletcher*, *ante* 633.

(2) But see *Rex v. Dickin*, 4 *Term Rep.* 282. And now by 32 *Geo.* 3. *c.* 58. informations in the nature of *quo warranto* for the exercise of any office or franchise in any city, borough, or town corporate. Whether exhibited with leave of the court, *or by his Majesty's Attorney General*, or other officer of the crown in behalf of his Majesty, are limited to six years from the day on which the defendant was admitted and sworn into such office.

Moor *vers.* The Mayor and Jurats of Hastings.

A fine certain may be alleged as a reasonable fine.
Cas. temp. Hard. 353. 362. S. C.

MANDAMUS to admit the plaintiff to his freedom, in which the custom was alleged, that the eldest son of a freeman born in the town after his father's admission, had a right to his freedom, paying a reasonable fine: and issue being joined upon the custom, the proof was of a constant payment of 6*s.* 8*d.* And it being objected, that this was proof of a fine certain, whereas it was laid to be a reasonable fine, which they construed an uncertain fine; the Chief Justice saved it to the defendants.

And upon great debate in court, the *postea* was ordered to the plaintiff: the proof being well enough, for a reasonable fine does not *ex vi termini* import an uncertain fine; and if it may be applied either way, it is well enough laid. In cases of a certain demand the legal description has been by the word *rationabilis*. Thus with respect to aids, which by *Westm.* 1. *c.* 36. are fixed at a sum certain, for knight service lands so much, and so much for socage lands; the writ in the *Register* 87. *a.* is *rationabile auxilium*. So at common law the wife was intitled to a third part of the goods of the husband, and yet the writ is *de rationabili parte bonorum*. *F. N. B.* 122. *b.* And though in *Co. Ent.* 646. an uncertain fine is called *rationabilis denarior' summa*; yet there is a measure to go by, the value of the land: but here is no such thing to estimate it by, or to found an opinion what is reasonable or not. Franchises are all of equal value; and therefore *reasonable* in this case must be certain, there being nothing that can vary it and be reasonable, and what is reasonable must be determined by what is usually paid.

Eafter Term

10 Georgii 2 Regis. In B. R.

Philip *Lord* Hardwicke, *Chief Juftice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Juftices.*
William Lee, *Efq;*

Dudley Ryder, *Efq; Attorney General.*
John Strange, *Efq; Solicitor General.*

Lord *Hardwicke* being Lord Chancellor as well as Chief Juftice of *B. R.* came into court 29 *April*, took the oaths, and heard my motion.

Between the Parifhes of Stoke-Prior *and* The Inhabitants of the Manor of Grafton.

A Poor perfon was removed to *Grafton*: and on appeal it was ftated to be an extraparochial place, formerly a feat of the Earl of *Shrewfbury*, confifting of a capital meffuage and three lodges in the park, but fince converted into five houfes and farms: and the feffions adjudge it a *ville*, that ought to maintain its own poor. This was moved to be quafhed, upon the authority of the cafe of *Denham* v. *Dalham*, *Hil.* 8 *Geo.* 2. and a rule was made to fhew caufe.

Five houfes in an extraparochial place do not conftitute a *ville*. Burr. Sett. Ca. 101. and Seff. Ca. ed. 1750. vol. 2. p. 217. No. 152. S C. Ante 1004.

Afterwards, on an affidavit of fervice, the rule was made abfolute, this not appearing to have the reputation of a *ville*.

Dominus Rex *verſ.* Green.

Dominus Rex *verſ.* Roper.

Practice.

INFORMATIONS were granted for perjury on the trial of an information for a conſpiracy; and all the parties proſecuted agreeing, the court on conſent arreſted the judgment on the conſpiracy, and quaſhed the two other informations. *Quod nota*, for it has not been uſual ſo to do, whereby ſuch proſecutions are ſtifled, and the Attorney General never grants a *nolle proſequi* in ſuch caſes, though by conſent.

Saltern *verſ.* Wynne.

An executor is not to pay coſts of error brought by him upon a judgment againſt his teſtator on going before the Maſter. Caſ. temp. Hard. 367. S. C. Skinn. 400. 3 Lev. 271. Carth. 281. Comb. 228. 4 Mod. 244.

AN executor brought error on a judgment againſt the teſtator upon bond: and after affirmance, moved on the act for amendment of the law, to pay principal, intereſt and coſts. It was inſiſted, that as he came for a favour to ſave the penalty, it was but equitable he ſhould pay the coſts in error which he had put the plaintiff to; for if the plaintiff had taken execution, equity would never puniſh him for taking thoſe expences out of the penalty: and the caſe of *Merril* v. *Jocelyn*, *Trin.* 13 *Ann. B. R.* was cited for that purpoſe.

Ante 871. and the note.

Ante 699. and the note.

E contra were cited *Baynham* v. *Matthews*, *Trin.* 4 *Geo.* 2. where an executor diſcontinued without coſts, and *Siſney* v. *Nevinſon*, *Paſch.* 12 *Geo.* 1. Upon the authority of which caſe, the court determined, that as by law the executor was not to pay coſts upon a writ of error (1), a court of law could not direct them to be taxed, though there was a penalty.

(1) It is otherwiſe where the original judgment is conditionally *de bonis propriis*. *Caſwell* v. *Norman*, *ante* 977. and indeed in all caſes where he would be liable to coſts in the original action. *Williams & al'* v. *Riley in Cam. Scacc.* 1 *H. Black.* 366.

Caſwall *verſ.* Martin.

Appearance cures defect in proceſs. Caſ. temp. Hard. 369. S. C.

THE *latitat* left out the words *de placito tranſgreſſionis*. Common bail was filed by the plaintiff; a declaration left in the office, which the defendant took out, and then moved to ſtay the proceedings. And upon ſhewing cauſe, *Strange* inſiſted, that the error in the proceſs was cured by the appearance, and

and cited *Salk.* 95. and the case of *Widdrington* v. *Charlton*, where in an appeal of murder it was so held. So *Pasch.* 9 *Geo.* 2. *Morgan* v. *Luckup*, there was no *English* notice under the process, and yet taking the declaration out of the office was held to cure it. Whereupon the rule to stay proceedings was discharged (1). Ante 1044. [1073]

(1) *Wright* & *al'* v. *Miller*, *M.* and see *Marquand* v. *Mayor* &c. *of* 21 *Geo.* 3. *Tidd's Prac. of K. B.* 98. *Boston.* *Barnes* 416.

Mendapace *vers.* Humphreys.

THE assize day at *Winton* was on *Wednesday*: and on the *Monday* night before, the notice of trial was countermanded to the agent in *London*. And the court held, it did not save costs; and that being given in town, it should be four days; if to the attorney in the country, two days would be sufficient. *Vide ante* 849. 14 *Geo.* 2. *c.* 17.

A countermand in town must be four days before the assizes.

Cas. temp. Hard. 369. S. C.

The Case of the Coroner of Westminster.

HE returned an inquisition, finding a *felo de se*, *non compos*. And it was moved, that he might be obliged to return the depositions; but the court refused to make any such rule, there being nothing depending before them, to make it necessary.

Coroner not obliged to return depositions.

May *vers.* May.

On a Trial at Bar before Page, Probyn *and* Lee, *Justices.*

IN a question upon the plaintiff's legitimacy, he produced the general register of the parish, wherein he was entered as the son of his father and mother, in the same manner as lawful children are entered: this register the clerk said, was a book into which the entries were made once in three months, out of the day-book, wherein the entries are made immediately after the christening, or next morning.

Day book from whence the register is made up not allowed as evidence to contradict the latter in a question of legitimacy (1).

To encounter this, the defendants asked him if any notice was taken of bastards; and he said, their method was, to add *B. B.* which stood for *Base Born*. And then they offered the day-book, from whence the other entry was posted, in which *B. B.* was in-

(1) *Bull. L. N. P.* 247. *Gilb. Law of Evid.* 3 ed. 76.

 serted;

ferted; and infifted, that it was the original entry. And this being oppofed, the opinion of the court was taken. *Page* Juftice was for allowing it to be read; but the other two Judges were againft it, faying, the other was the only regifter, and there could not be two regifters in one parifh. So the book was rejected.

[1074]

Dominus Rex *verf.* Sutton.

Having coining tools is indictable.
Caf. temp. Hard. 370. S. C. more full.
See 2 Black. Rep. 807. 822.
1 Hawk. P. C. ch. 17. fect. 66. p. 101.
Ib. fect. 75. p. 103.

HE was convicted at *Northampton* affizes, for unlawfully having in his cuftody and poffeffion two iron ftamps, with intent to imprefs the fcepters on fixpences, and to colour and pafs them off for half guineas. And Lord *Hardwicke*, who tried him, having fome doubt whether the bare having them in his cuftody, without fhewing he ufed them, or did fome act to procure them, was indictable; directed a *certiorari* to be brought. And after it had been twice argued, the court was of opinion, that it was well enough: for coining was the prerogative of the crown at common law: that this could not be a cafual having them innocently, or coming to him as executor; becaufe it is laid, and found, that he had them with an intent to imprefs. 3 *Inft.* 18. fays, the perfon may be imprifoned, in whofe cuftody fuch inftruments are found; and fhall he be imprifoned for what is not indictable? Lading wool is lawful, but if it be with an intent to tranfport it, that makes it an offence: here the intent is the offence; and the having in his cuftody, an act that is the evidence of that intent. We muft not be too nice in thefe indictments, which Lord *Hale in Hift. P. C.* 193. complains of in the courts. The defendant was fined 6*s.* 8*d.* to ftand in the pillory at *Charing-crofs*, and fuffer fix months imprifonment, and until his fine paid.

Trinity Term

*10 Georgii 2 Regis. In B. R.

* 10 & 11. See Burr. Sett. Caf. 107.

Sir William Lee, *Knt. Chief Juftice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Juftices.*
Sir William Chapple, *Knt.*

Dudley Ryder, *Efq*; *Attorney General.*
John Strange, *Efq*; *Solicitor General.*

Wharton *verf.* Richardfon, Vid'.

A *Scire facias* was brought againft the defendant as adminiftratrix of her hufband, on a judgment againft him for 1,500*l.* and after two *nichils* returned, a *fcire fieri* inquiry was taken out, and the defendant attended the execution of it, in order to lay the ftate of the affets before the jury; but the plaintiff infifting, that the award of execution on the former writs was in point of law an evidence of affets, a *devaftavit* was found to 1,117*l.* 18*l.* 1*d.* In *Hil.* 8 *Geo.* 2. fhe appeared to the *fcire fieri* inquiry, pleaded *plene adminiftravit*, and traverfed the *devaftavit.* And notice of trial being given and countermanded, and nothing further done upon it; fhe in *Mich.* 10 *Geo.* 2. moved to have the award of execution fet afide, and to be admitted to

Scire fac. againft an adminiftratrix on a judgment againft her hufband after two *nichils* returned, a *fcire fieri* inquiry is taken out; the award of execution on the former writs is evidence of affets (1). But where there has been no *fcire feci*, and only two *nichils* returned, the court, on motion, will fet afide the award of execution, and admit defendant to plead, if he comes in time. Otherwife if he acquiefce upwards of two years (2). 1 Will. 125. S. C. 1 Lord Raym. 591. *Contra per Gould* J.

(1) *Vide Earl* v. *Hinton, ante* 732.

(2) *Vide Mitford* v. *Cordwell, poft.* 1198.

 plead;

plead; it being no purpofe to expect relief upon the trial of the traverfe: and cited *Salk*. 93. 264. to fhew, that where there has been no *fcire feci*, and only two *nichils*, the court will relieve upon motion, and not put the party to an *audita querela*: and the ftate of the real affets was proved to be 130 *l.* which fhe offered to deliver up, and be examined upon interrogatories, if the plaintiff was diffatisfied with the account.

[1076] The court was greatly inclined to relieve her: but upon confideration of her long acquiefcence, and the feveral fteps taken fubfequent to the award of execution; they thought fhe came too late, and for that reafon only, refufed to interpofe.

Stone *verf.* Atwoll.

If an infant refufes to name a guardian to appear by, the plaintiff may do it for him.

BY 12 *Geo.* 2. *c.* 29. if the defendant does not file common bail in time, the plaintiff may do it for him: in this cafe the defendant was an infant, and had appointed no guardian by whom to appear: and the court made a rule, that the plaintiff fhould name a guardian for him, if he refufed to do it himfelf (1).

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(1) *Shipman* v. *Stephens*, S. P. in *C. B.* 2 *Wil.* 50. *Vide* alfo *Gladman* v. *Bateman*, *Barnes* 418. *Kerry* v. *Cade*, *ib.* 413.

Dominus Rex *verf.* The Inhabitants of Bedall in Yorkfhire.

If no accefs of the hufband be adjudged, the iffue are baftards. Caf. temp. Hard. 362. 379. Bull. L. N. P. 112. Anor. 9. S. C. Ante 925. 940.

AN order was made upon one *Moor*, as the putative father of two baftards born of the body of *Elizabeth* the wife of *Richard Sharplefs*: in which it is ftated, that for feven years before, the hufband had had no accefs to her, fhe having never feen or heard of him all that time, and not knowing whether he was alive or dead; which the juftices adjudge to be true, and that *Moor* is the father of them, and order him to provide accordingly.

Upon appeal to the feffions, the cafe is ftated with fome variation: that in 1728, fhe was married to *Sharplefs*, then a foldier in *Mullins*'s troop, in a barn, by a perfon not in the habit of a clergyman: that there had been no accefs for feven years: but it appearing by a certificate from the commiffary general's office, 7th *April* 1737, and from the evidence of *Simon Clarkfon*

that

that one *Richard Sharpless*, who he was told was formerly in *Mullins*'s troop, was mustered as a private gentleman in the third troop of horse guards from 25 *June* 1733, to 23 *February* 1736, though *Clarkson* said he could not take upon him to swear that it was the same *Richard Sharpless* pretended to be married as aforesaid: upon this supposition of the husband's being alive, the sessions were of opinion, the children were not bastards, and reversed the order of the two justices.

And now upon debate (the Chief Justice absent) the order of sessions was quashed, and the order of two justices confirmed: for it being stated in both orders, that there was no access, according to the case of *Pendrel* v. *Pendrel*, *Hil.* 5 *Geo.* 2. *ante* 925. it was immaterial whether the husband was alive or not: but if it was material, here is no evidence to prove it, the identity not being sworn to; or if it was, yet the evidence of his being alive was improper to have been received, and even the marriage itself doubtful. [1077]

Robinson un', &c. *verf.* Niccolls.

THE plaintiff brought debt upon a judgment, where the money recovered was under 10*l.* but by the addition of costs exceeded it: and he held the defendant to bail, and bail was put in above. Then the defendant moved on the authority of *Gammage* v. *Watkin*, *Pas.* 7 *Geo.* 2. that common bail should be accepted, and Mr. Solicitor General *pro quer'* agreed it to be the rule; but insisted that by actually putting in bail, the defendant was too late in the application: and cited *Laferre* v. *Johnson*, *Hil.* 13 *Geo.* 1. *ante* 745. where on error an executor gave bail, which he needed not to have done, and the court refused to vacate the recognisance.

Putting in bail where not required, does not bind the court from ordering common bail. Andr. 15. S. C. Ante 975. and the note.

But in this case the court ordered common bail; for the plaintiff, who was an attorney, ought not to have marked his process for bail, and therefore should not take advantage of his own mistake.

Dominus Rex *verf.* The Inhabitants of Butley in Suffolk.

THE question in this case was, whether renting a wind-mill at 14*l.* *per annum* gained a settlement; it having been determined, that a water-mill did. *Salk.* 536. It was said, those

Renting a wind mill is a settlement. Burr. Sett. Ca. 107. and Sett. Ca. ed. 1750. vol. 1. p 402. No. 320. S. C. Cas. temp. Hard. 391. Andr. 3. S. C.

are always habitable, but the others often are not. *Sed per curiam*, It is the fame as if he had rented land of that value. And *H.* 8 *Geo.* 1. *Rex* v. *St. Mary in Guilford*, *ante* 502. it was a mill generally, and held a fettlement. And fo it was in this cafe (1).

(1) The pauper lived in a cottage which he rented in the fame parifh. *Vide* the other reports of this cafe.

Bean *verf.* Elton.

New writ of inquiry, *&c.* ordered to be made on lofs of the former. *N. B.* No caufe was fhewn againft the rule. Andr. 12. S. C.

A Writ of inquiry was executed in *Trin.* 1728, and cofts taxed upon it, but no final judgment entered up. And now there being occafion to prove the debt in Chancery, the writ of inquiry could not be found: and a rule was made for a new writ of inquiry and inquifition, according to the fheriff's notes, and that the mafter fhould indorfe the cofts, which by the commitment book appeared to have been taxed. *Vide ante* 141. 833. (1)

(1) 1 *Vent.* 92, 93. 2 *Kely.* 106. *Darby* v. *Gold*, *poft.* 1264. *Dayrell* v. *Bridge*, *Barnes* 14.

[1708]

Adams *verf.* Broughton.

A recovery in trover vefts the property in defendant. Andr. 18. S. C. Kelw. 58. b S. P. *Per Frowike*, 12 Mod. 145. In *Sutton* v. *Mccoy*, *per Holt* C. J.

THE plaintiff recovered in trover againft the captain, for yarn configned to him. The captain obtaining an injunction, on fhewing the goods were delivered to the defendant; the plaintiff brought an action againft him, and held him to bail. And the court difcharged him on common bail, for by the former recovery the property vefted in the captain, the plaintiff having damages in lieu thereof, and therefore in this action he could not fay the goods were his.

Burton *verf.* Fitzgerald. At Guildhall.

Sentence of a foreign admiralty condemning a fhip as unfit, not to be read in an action on the charter-party.

ACTION on a charter-party, to go to *Calais*, and take in corn for *Spain*. The defendant pleaded, that the fhip was unfit for the voyage, being rotten, and therefore he did not load her. And iffue being joined upon the goodnefs of the fhip, and feveral witneffes examined; the defendant offered

I to

to give in evidence a proceeding in the admiralty court at *Calais*, whereby commiſſioners were appointed to ſurvey the ſhip, upon whoſe report there was a ſentence of condemnation. It was objected, that this being a contract under ſeal on land here, the admiralty there had no juriſdiction, and conſequently their ſentence void. It appeared that the plaintiff intervened in the ſuit, and had an inſpector of his own nomination put into the commiſſion. And it was inſiſted by me and others, that faith was to be given to theſe proceedings; and we are not to ſuppoſe, that the ſame boundaries between courts ſubſiſt there as here: and on inſurances nothing is commoner than to read proteſts in foreign admiralties. But the Chief Juſtice refuſed to let it be read, this being a contract under ſeal at land, in which caſe according to our law the admiralty has no juriſdiction.

Michaelmas Term

11 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt.* *Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
Sir William Chapple, *Knt.*

Dudley Ryder, *Esq*; *Attorney General.*

John Strange, *Esq*; *Solicitor General.*

Turner *vers.* Warren.

In action by the loser at gaming, special bail shall be given. Andr. 70. S. C. more full. 12 Mod. 295.

THE plaintiff brought his action for 200*l.* as the loser of so much by gaming. And the question was, upon 9 *Ann. c.* 14. which gives an action of debt at any time within three months against the winner, whether the defendant could be held to special bail; the defendant's counsel comparing it to the case of actions upon penal statutes, where no bail is ever required.

But the court held, there ought to be special bail in this case, which is at the suit of the party grieved, and wherein the defendant is a debtor to the plaintiff. And the clause is to be considered as remedial. And therefore upon consideration, and talking with the other Judges, special bail was ordered.

[1080]

Hamelton *vers.* Style.

Wilks *vers.* Eames.

Of the costs upon a special jury. 3 Geo. 2. c. 18. Andr. 51. 53. S.C.

UPON consideration of the jury act, 3 *Geo.* 2. *c.* 25. § 16. which says that the party applying for a special jury shall be at the costs of striking the same: the court held, that if the verdict

verdict goes on that side which moved for the special jury, the extraordinary allowance to a special jury, and all the expences, except what attend the actual striking, should be taxed and allowed against the losing party. See Hullock on Costs 433.

Skipp *vers.* Hooke.

UPON error *e C. B.* it appeared, that the *placita* was of *Octab.* and *Quinden' Hilar'* before Mr. J. *Denton*, Mr. J. *Comyns* and Mr. J. *Fortescue Aland*, and for the rest of the term before Sir *John Willes* and his brethren. And upon a *certiorari* for the writ of inquiry, it was returned *Teste Philip* Lord *Hardwicke*, 27 *April*, 10 *Geo.* 2.

B. R. will not judicially take notice who are the Judges of *C. B.*
Andr. 75. S. C.

It was objected, that this was no warrant to the sheriff, it appearing Sir *John Willes* was constituted Chief Justice before the issuing the writ of inquiry, and that therefore it ought to bear *teste* in his name. To which it was answered by the Solicitor General, that though the court had a private knowledge who was Chief Justice of *C. B.* at that time, yet they could not judicially take notice of it, and Lord *Hardwicke* might be Chief Justice in *Easter* term, when the writ of inquiry issued. Besides, this was an exception to reverse a judgment, in which case the court will never go out of the record; and, indeed the proper way to take advantage of this matter was, by motion in *C. B.* for irregularity. And of that opinion was the court, and the judgment was affirmed.

Ante 1064. Post. 1226.

Cart *vers* Marsh.

A Dispute arose between the parties upon cross petitions exhibited to the archdeacon of *Bedford* and commissary of the bishop of *Lincoln*, for leave to erect a monument against a pier in *Dunstable* church, to the memory of their respective ancestors. And upon allegations given on both sides, *Marsh* appealed to the Arches against the admission of *Cart*'s allegation; upon which *Cart* moved for a prohibition, insisting, 1. That ornaments were discretionary only in the ordinary, and therefore no appeal would lie: or 2. If it did, yet it must be to the bishop of *Lincoln*, and not to the Arches.

An appeal lies about setting up ornaments in the church.
And. 69. S. C.
1 Burn Eccl. Law. 343.

[1081]

But the court held, that though ornaments cannot be set up without the consent of the ordinary (1); yet it must be exercised

(1) *Palmer* v. *Episcopum Exon'*, *ante* 575.

according

according to a prudent and legal difcretion, which the fuperior has a right to look into, and correct; and therefore the appeal well lay, as it does in cafes of granting adminiftration to one, where there are two in equal degree. And as to its being an appeal to the Arches it was held, that wherever the act is done by a commiffary, it is confidered as the act of the ordinary himfelf; and to him no appeal will lie from his own act, and it muft confequently be to the Metropolitan. So the rule for a prohibition was difcharged.

French qui tam *verf.* Coxon.

Practice as to affidavits in *qui tams.* Andr. 25. S. C.

THE action was upon the ftatute of Ufury, 12 *Ann. ft.* 2. *c.* 16. and a motion to ftay the proceedings, becaufe no affidavit was filed of the caufe of actions accruing within a year, according to 21 *Jac.* 1. *c.* 4. But the court held it not neceffary, as well becaufe that act had been held not to extend to fubfequent ftatutes, (*Salk.* 373, 374.) (*a*) as alfo becaufe this very had been determined, *Paf.* 7 *Geo.* 2. *Harris qui tam* v. *Reyney* (*b*), on 15 *Car.* 2. *c.* 18. againft buying and felling live cattle: and the practice had never been to file any fuch affidavit (1).

(*a*) S. C. 1 Ld. Raym. 370. 3 Salk. 200. 5 Mod. 425. Holt 364. 12 Mod. 223.
(*b*) Rep. Cun. 30. 2 Barnard. B. R. 413. 420.

(1) In *White qui tam* v. *Boot*, 2 *Term Rep.* 274. proceedings were ftayed in an action upon 25 *Edw.* 3. *ft.* 4. *c.* 3. for want of fuch an affidavit. But *Leigh qui tam* v. *Kent*, 3 *Term Rep.* 362. which was an action founded on 21 *Hen.* 8. *c.* 13. for non-refidence the objection was made after verdict, and it was over-ruled, the cafe of *White qui tam* v. *Boot* doubted, and the refult of the old cafes ftated to be, that 21 *Jac.* 1. *c.* 4. is merely directory to the officer, and does not control any of thofe ftatutes upon which penal actions are to be brought in the fuperior courts.

Chancy *verf.* Needham.

Practice on entring up judgment on old warrants of attorney. Andr. 53. S. C. 14 Vin. Abr. 17. pl. 7.

ON the 11 *November* about twelve at noon, a motion was made to enter up judgment upon an old warrant of attorney, and an affidavit was produced, fworn the day before, of the party's being alive, and the debt unpaid, upon which the court made the common rule.

The Solicitor General at another day moved to difcharge it, upon an affidavit, that the defendant died the day the firft motion was made at feven of clock in the morning; and infifted, that this was by furprize upon the court. And on great debate the

the court declared, that if it had then appeared, that the man was dead, they would not have made the rule (1): but they applied the maxim, *fieri non debet, factum valet*, to this case: and compared it to the cases *Salk.* 82. and *Fuller* v. *Jocelyn*, *ante* 882. And thus suffered the deceit, which had been put upon them, to prevail.

(1) *Wild* v. *Sands*, *ante* 718. S. P. in *B. R.* *Saville* v. *Wiltshire*, S. P. in *C. B.* *Barnes* 270.

Openheimer *vers.* Levy. [1082]

IN case *sur assumpsit*, the defendant pleaded in abatement, that the plaintiff was an alien born at *Vienna* under the dominion of the King of the *Romans*, and out of the allegiance of our King: to which the plaintiff demurred. And upon argument it was held, that as by law an alien friend may maintain a personal action, as being allowed to traffick. 1 *And.* 25. *Dy.* 2. *b.* *Broke*, *Denizen.* *Yelv.* 198. it is necessary in order to abate the writ, that he should be shewn to be alien enemy, which is not to be presumed, nor the contrary necessary to be replied: and all the precedents are *inimici Domini Regis*. So a *respondes ouster* was awarded.

Plea that plaintiff is an alien must shew that he is an alien enemy. Andr. 76. S. C. by the name of *Hopper* against *Leppett*, vide 1 Com. Dig. Abatement, (E. 4.) 10.

Clarke *vers.* The Bishop of Sarum.

A *Mandamus* was granted to admit the plaintiff to a canonry or prebend of *Sarum*, and to institute, induct and invest him therein; though it was strongly opposed on the rule to shew cause, as turning the common law remedy by *quare impedit* into another channel. But the court said, that though formerly *mandamus's* were not so frequent, especially where the party had another remedy; they being found to be more expeditious and less expensive, had been given into of late. And as to there being another remedy; it might be said equally in cases where an assise or an action upon the case would try the right, and yet that was never thought a ground to deny a *mandamus*: so the writ was ordered, but never issued, the parties agreeing to refer the dispute (1).

Mandamus for a prebend. Andr. 20. 185. S. C. Skin. 45. 1 Lev. 108. 1 Vent. 188. 1 Jon. 199.

(1) In *Powell* v. *Milbank*, 1 *Term Rep.* 401. n. the present case is held not to be law. *Per Denison* J. and Lord *Mansfield* C. J. and though the power of the court to issue this writ is discretionary, it

it seems now settled, that where a *quare impedit* lies, they will not grant a *mandamus*. *Rex* v. *The Bishop of Chester*, 1 *Term Rep.* 396. *Rex* v. *Marquis of Stafford*, 3 *Term Rep.* 646. The cases here cited in the margin do not appear to relate to the question. In the report in *Andrews*. *The King and the Dean and Chapter of Ardmagh*, *Rex* v. *Dean and Chapter of Norwich*, *ante* 159. *Rex* v. *Dean and Chapter of Dublin*, *ante* 536. are cited in support of the rule. But in the case of the *Dean and Chapter of Norwich*, *Doctor Sherlock* was prebendary by virtue of an act of Parliament, and he had no remedy but a mandamus to get into his stall. In the case of *The Dean and Chapter of Dublin* there was no determination on the point, but the majority of the Judges inclined against the mandamus, and there also the object of the writ was to admit the prebendary into his stall. But though the court will not grant a mandamus in any case where there exists a specific legal remedy. *Rex* v. *Governor and Company of the Bank of England*, *Doug.* 523. Yet if that remedy is obsolete, as if it be by writ of assize, they consider it as an exception to the rule. *Per Buller* J. 4 *Term Rep.* 404. *Per Grose* J. 3 *Term Rep.* 652.

Booth *vers.* Garnett.

Awarding the giving a note is the same as awarding payment at a future day.
And. 28. S. C. more full.

DEBT upon a bond, the condition whereof recited, that the plaintiff and *Gilbert* had submitted a dispute to arbitration; and therefore if the defendant should pay what *Gilbert* should be awarded to pay, not exceeding 20*l.* the bond to be void. On the replication it appeared, that the award was for *Gilbert* to give the plaintiff his note for 18*l.* payable at a future day. And it was insisted upon for the defendant, that his bond was only to pay the money awarded; and therefore as the award was to do a collateral act, it was not within the condition.

But the court said, that awards were to have a reasonable intendment: and all the meaning of this was to give the party time, and is equal to ordering him to pay the money at the future day, without saying any thing of giving a note in the mean time. And therefore they gave judgment for the plaintiff.

Whywall *verf.* Champion.

At Guildhall coram Lee *C. J.*

IT was ruled, that tobaccoes fent to the defendant, who fet up a fhop in the country, could not be recovered for as neceffaries, he appearing to be an infant. For the law will not fuffer him to trade, which may be his undoing.

Andr. 28. S. C. more full.
An infant cannot be charged for goods delivered to trade with.

Latch. 169. Salk. 279. Cro. Jac. 454. S. P. Bull. L. N. P. 154. 12 Vin. Abr. 213. [T. b. 4.] pl. 3.

Jarvis *verf.* Hayes. At Guildhall.

IN an action againft the defendant as mafter, for his carman's negligently driving his cart, *per quod* the plaintiff was thrown off from a ladder and bruifed. On fhewing a releafe from the mafter to the fervant, the Chief Juftice allowed the mafter to examine the fervant; though it was urged, that if the plaintiff fails againft the mafter, he may fue the fervant, which is a bias upon the fervant. *Strange pro def'.* (1)

Servant where witnefs in action againft the mafter.

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(1) *Anon.* 12 *Vin. Abr.* 25. *pl.* v. *The New River Company*, 4 38. *S. P. Bull. N. P.* 77. *Green Term Rep.* 589.

Hilary Term

11 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Lord Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
Sir William Chapple, *Knt.*

Dudley Ryder, *Esq*; *Attorney General.*
John Strange, *Esq*; *Solicitor General.*

Fergufon *verf.* Rawlinfon qui tam.

There may be cofts on error, though none in the original fuit. Andr. 113. S. C.

AFTER affirmance of a judgment of *C. B.* for the treble value on the ftatute of ufury; it became a queftion, whether as the plaintiff recovered no cofts in the original action, he could have his cofts in *B. R.* upon the writ of error. And upon confideration the court declared, he was intitled to them by the exprefs words of 3 *H.* 7. *c.* 10. *in delay of execution:* and that it was the ftronger, fince 8 & 9 *W.* 3. *c.* 10. under which the defendant would have been intitled to cofts, if there had been judgment for him in *C. B.* and affirmed here. Cafes cited for cofts were *Cro. El.* 659. 5 *Co.* 101. *Cro. Car.* 145. *Dy.* 77. *E contra Cro. Car.* 425. 1 *Lev.* 146. 1 *Vent.* 38. (1)

(1) *Vide The Archbifhop of Dublin* v. *The Dean of Dublin, ante* 262.

Bennington *verf.* Goodtitle.

Ejectment lies for a beaft-gate. Andr. 106. S. C. Ante 1063.

ON error in ejectment, it was held to lie for a beaft-gate, which is a term known in *Suffolk*, and imports land and common for one beaft (1). And the judgment was affirmed.

(1) *Metcalfe* v. *Rowe, Caf. temp. Hard.* 167.

Bosworth *vers.* Hearne.

UPON a return of a *habeas corpus*, it appeared, that the suit was by the chamberlain of *London* upon a by-law made in 15 *Car.* 2. that no drayman or brewer's servant should be abroad in the streets with his dray or cart after one of the clock in the afternoon between *Michaelmas* and *Lady-day*, and from thence after eleven in the forenoon, under the penalty of 20 *s*. And a custom was returned, for the city's having the regulation of carts (1).

By-law to confine brewers to certain hours for carrying out drink, good. Cas. Temp. Hard. 405. Andr. 91. S. C. more full.

It was agreed both at bar and bench, that such a custom may be good: but that without a custom the by-law would be void. And the only question disputed was, whether this was a reasonable restraint.

Many objections were made by Mr. Solicitor, arising from the nature of the brewers trade, and the necessity it would put them under of using more carriages, and employing more servants; the consequence whereof would be the raising the price upon the consumer, or lowering the quality of the beer.

But the court said, that as this was only a regulation of trade, of which the city was the best judge; it was enough, that it did not appear unreasonable in itself. And that within the reason on which many of the city by-laws had been held good, they were warranted in granting a *procedendo* (2).

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(1) *Vide Payne* v. *Haughton*, 1 *Ro. Abr.* 364. *pl.* 5. *Player* v. *Vere*, *T. Raym.* 288, 324. 1 *Vent.* 21. 2 *Keb.* 420, 501. 1 *Sid.* 284. S. C.

(2) *Vide Wannel* v. *Camerar*, " *Civit*" *London*, *ante* 675.

French, qui tam *vers.* Wiltshire.

AFTER verdict for the plaintiff for 500 *l.* penalty for keeping a *Pharo* table, it was moved in arrest of judgment, that the *venire* was *de corpore comitatus*, whereas actions upon penal statutes are excepted in the act for amendment of the law. But the court held, that since the jury act 3 *Geo.* 2. *c.* 25. the sheriff could return no other than the general pannel, and therefore the proviso was virtually repealed: or if not, yet the 5 *Geo.* 1. *c.* 13. had cured this, either as a defect in form or substance. And

Since the jury act the *venire facias* must be *de corpore comitatus* in the actions excepted by the act for amendment of the law. But see now stat. 24 Geo. 2. c. 18. s. 3. a. 2d ed.

And actions of debt are not within the proviso in the last mentioned act (1).

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(1) *Merrick* v. *Lord Offulston*, *Andr.* 115. S. P. on the statutes of hue and cry. *Wynne* v. *Middleton*, 1 *Wils.* 125. S. P. in an action on 7 & 8 *W.* 3. *c.* 7. for a false return. And S.P. on 9 *Ann* *c.* 14. *f.* 2. for money won by gambling at one sitting. *Frederick Bart.* v. *Lookup*, 4 *Burr.* 2018.

[1086]

Berrington *verf.* Parkhurst et al'.

There must be an actual entry to avoid a fine, and the demise cannot be laid on a day before the entry.
4 Bro. Par. Ca. 353.
Andr. 125. S. C.

UPON a trial at bar in ejectment on the demise of *John Dormer*, Esquire, for a manor and lands in *Bucks*, a special verdict upon the family settlement was found; but as neither the King's Bench nor House of Lords gave any opinion upon that part of the case, it is unnecessary to state the same.

As to the point on which the judgment was given, it was shortly thus. The defendants (as disseisors for argument sake) levied a fine in 1730. To avoid this the lessor of the plaintiff made an actual entry on 6th of *January* 1731. and in *Hilary* term after brought his ejectment, and laid the demise 1 *October* 1731. which was three months before the actual entry.

And it was insisted on for the defendants, 1. That an actual entry was necessary to avoid the fine. And 2. That the demise could not be laid before the lessor had regained the possession by the actual entry.

As to the first of these, it was argued for the plaintiff, that the 4 *Hen.* 7. *c.* 24. was in the disjunctive, *so as the claim is pursued by action or lawful entry*, and that therefore the ejectment is sufficient, if the actual entry was out of the case.

And as to the second it was argued, that upon the entry the lessor's estate was re-vested, and he might maintain trespass for an act done during the disseisin. And unless he was allowed to lay his demise backwards, he could never recover the *mesne* profits.

To which it was replied, 1. That ejectments were not in use at the time of making the statute, and real actions only were intended: and if ejectments would do, all the questions that have been made about actual entries must have fallen to the ground, by the answer, that an ejectment was a suit that came within the alternative, those questions having all risen in ejectments.

1 *Saund.* 319. 1 *Vent.* 42. 1 *Mod.* 10. 2 *Keb.* 555. *Skinn.* 423. And *Hil.* 2 *Ann.* 1703. 30th *January*, at a meeting of all the Judges (except *Price*) it was resolved, that in the case of a fine, there must be an actual entry within five years, and that the confession of an entry to deliver a lease in ejectment shall not operate to avoid a fine. And the act for amendment of the law, which says, the claim or entry shall be of no effect to avoid a fine, unless an action is commenced within a year after; shews it must be an actual entry to be prosecuted with an action, and that the action is not such an entry as is required. [1087]

And as to the second point, it was observed, that the constant doctrine has always been, that one out of possession cannot make a lease; and therefore in verdicts it is always found that the lessor entered and was seised *prout lex postulat*. That here was a time when certainly the lease was void, *viz.* from the making to the entry; and the question in ejectment always is, whether the lessor could *then* make the lease; and he is nonsuited if he lays the demise before the title accrued; that supposing this may affect him as to the *mesne* profits; it is his own *laches*, and the owner is supposed to live upon them all the while.

And upon this point the King's Bench gave judgment for the defendants. And on error in Parliament, the Judges were all ordered to attend, when, after two days argument at the bar, two questions were put to the Judges. 1. Whether an actual entry was necessary to avoid the fine. To which they all answered, that it was. 2. Whether the demise being laid before the time of the first entry, this ejectment could be maintained. To which they answered, It could not. So without putting any question upon the merits, the judgment was affirmed with 10 *l.* costs (1.)

(1) *Vide Fitchet* v. *Adams*, *post.* 1128. *Oates* v. *Brydon*, 3 *Burr.* 1897. *Goodright* v. *Cator*, *Doug.* 486. But this is to be understood of a fine with proclamations, for an actual entry is not necessary to avoid a fine at common law. *Jenkins* v. *Pritchard*, 2 *Wils.* 45. and see *Musgrave* v. *Shelly*, 1 *Wils.* 214.

Collins *vers.* Butler. At Guildhall.

A Note was payable 27th *December* 1732. The drawer shut up his house, and went away the *November* before. And the question was, whether in general a demand upon the drawer is necessary before the indorsor can be charged; and if it was, whether in this case the plaintiff had shewn sufficient, in proving the shutting up the house.

There must be a demand on the drawer of a promissory note before indorser can be charged.

As to the first the Chief Justice ruled, that a demand on the drawer was necessary, as was determined in *C. B. Pasch.* 4 *Geo.* 2. on great debate (1). And in this particular case, he held the plaintiff had not not gone far enough, but ought to shew, that he had inquired after the drawer, or attempted to find him out.

(1) Because the drawer of a note is after its indorsement in the nature of an acceptor of a bill of exchange on whom a demand must be made. This point upon which six Chief Justices are said to have divided themselves equally in contradictory opinions, is now considered as fully settled, and the distinction between notes and bills of exchange in this respect well established. *Vide Pardo* v. *Fuller*, *Com. Rep.* 579. *Heylin* v. *Adamson*, *Burr.* 669. *B. L. N. P.* 277. *Bromley* v. *Frazier*, *ante* 441. and *Vide Hamilton* v. *Mackrell*, *Cas. Temp. Hardw.* 322.

Easter Term

11 Georgii 2. Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*
Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
Sir William Chapple, *Knt.*
Dudley Ryder, *Esq*; *Attorney General.*
John Strange, *Esq*; *Solicitor General.*

Dominus Rex *vers.* Bainton.

AN indictment at the quarter-sessions for perjury at common law, was quashed for want of jurisdiction; and said to have been done so before about three years ago. *Rex* v. *Westiness* (1). What indictment is quashable.

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(1) *Regina* v. *Yarrington*, *Salk.* *p.* 60. 4 *Com. Dig.* Justice of the Peace. (B. 1.) 529. 406. 2 *Hawk. P. C. c.* 8. *f.* 38.

Dominus Rex *vers.* Harwood.

THE defendant being a justice of peace, was convicted on an information, for a conviction by him made of an alehouse-keeper, who was never summoned or heard. And Sir *Thomas Abney* moved it as of course, to dispense with his appearance. This was opposed, unless there was some reason given, or affidavit made. And upon debate the court resolved, it was

Practice. Andr. 152. S. C. Vide Salk. 56.

was not of courſe, and the defendant afterwards appeared in perſon.

Hooper *verſ.* Shepherd.

Debt lies on a deed, and the jury muſt give a verdict as to the whole demand. Andr. 156. S.C. more full. Vide 1 L. Raym. 324. 2 L. Raym. 1518. Cro. Eliz. 133. 3 Lev. 55. Hardr. 166. Gilb. C. B. 3d ed 156. 5 Com. Dig. Pleader. (S. 19.) 519.

ERROR of a judgment in *C. B.* in debt upon a charter-party, whereby the defendant was to pay fifty guineas *per* month. And the plaintiff ſtates, that 652 *l.* 10 *s.* was due for the whole, 152 *l.* 10 *s.* whereof he had received, and the remainder was 500 *l.* for which the action was brought. The defendant pleaded, that he had paid at the rate of fifty guineas *per* month for all the time the ſhip was in his ſervice: and iſſue being taken, that he did not; the jury find, that 257 *l.* 11 *s.* remained unpaid, but ſay nothing as to the reſt of the 500 *l.*

It was firſt objected, that covenant, and not debt, was the proper action: but this was got over, it being founded upon a deed, in which caſe debt will lie, according to 1 *Roll. Abr.* 591. *Cro. Eliz.* 561, 758. 1 *Roll. Abr.* 597. *Sti.* 31. 3 *Lev.* 429.

But then it was objected, that this was an imperfect verdict, the jury not having anſwered to all they were charged with; according to *Co. Litt.* 227. *a.* 1 *Roll. Abr.* 802. *pl.* 5. *Cro. Jac.* 31, 113. 3 *Lev.* 55. Mr. Solicitor would have ſupported this by obſerving that this was a ſpecial iſſue, the ſubſtance whereof was, how long the plaintiff was unpaid for, and therefore differs from the general iſſue of *nil debet*, where he admitted the jury muſt anſwer to the whole, elſe the defendant might be called upon again: but here there was no ſuch danger, this being a determination of what is due upon the foot of all the time in the charter-party, and conſequently ends all the queſtion in diſpute between the parties, and no new action can be brought for any of the time: and wherever the ſubſtance of the iſſue is found, it is ſufficient. *Co. Litt.* 227. *a.* *Yelv.* 148. 9 *Co* 67. 112.

But the court held this caſe was not thereby diſtinguiſhed from the general rule, and therefore reverſed the judgment.

Chapman *verſ.* Maddiſon.

B. R. will expect a return of a *latitat* to *Durham.* Andr. 191. much fuller.

A *Latitat* was offered to the proper officer of the Biſhop of *Durham*, and a demand made upon him to iſſue the uſual mandate for an execution of the proceſs. The officer refuſed to receive it, upon pretence that the proceſs of *B. R.* would not run in the county palatine. And upon motion againſt him for an attachment,

attachment, a long argument was made by the Bishop's counsel, to shew the antiquity and dignity of counties palatine, and that no process will run there, but from the Exchequer, which is considered as a prerogative suit. But the court on consideration declared, that whatever might be the case, when the question came properly before them upon a claim of conusance, or plea to the jurisdiction; yet they would never endure, that the officer should refuse to receive their process. They cited *Lee* v. *Ransome*, *Mich.* 9 *Geo.* 2. where to a *latitat* into the county palatine of *Lancaster*, it was returned, that the writ lay not; and the court quashed the return, as not being a proper way of bringing the point in question. They said the true meaning of the expression *Breve Domini Regis non currit* is, that the court cannot write directly to the sheriff, as they do in other cases. In this case the rule for an attachment was made absolute (1). Vide Harg. Tracts, 417, &c.

(1) So a *latitat* runs into *Wales* v. *Thomas*, 1 *Wilf.* 193. and *Jones* *Perry* v. *Jones*, *Doug.* 213. *Lloyd* v. *Jones*, *ib.* *n.* (10.) but *Lampley* v. *Jones*, *ib.* 206. are *contra*.

Otway *verf.* Ramfay.

Debt lies not in *Ireland* on a judgment in *England* (1). 14 Vin. Abr. in notes 569. pl. 5.

THE great question in this case (which came from *Ireland*) was, whether debt would lie there upon a judgment in *B. R.* in *England*. And after two solemn arguments, upon which the court strongly inclined that it would not, a third argument was appointed. But the plaintiff in error, who was plaintiff and had judgment against him below, declining any further argument; the judgment in *Ireland* was affirmed, without any opinion delivered by the court, further than what was said upon breaking the case at the former arguments.

(1) *Vide Walker* v. *Witter*, *Doug.* 1. and the cases there cited.

Dominus Rex *verf.* Lifle.

A bare swearing in and acting does not make a man an officer *de facto*, and unless there is some form of election he is a mere usurper Andr. 163. S. C. much fuller. Vide 2 Barnard. B. R. 193. 264.

UPON an information in nature of a *quo warranto* for the office of mayor of *Christ-church*, the defendant's title depended upon two questions, on which a special verdict was found. 1. Whether one *Goldwyer*, who presided at the election of the defendant, was a mayor *de facto*. And, 2. If he was, whether the presiding of a mayor *de facto* in this case was sufficient to make a title in the defendant against the crown.

 As

As to the firft point, the fact as found was, that *Goldwyer* was never elected mayor, or ever had any lawful right or title to the office; but that under colour of being elected, he was in fact prefented and fworn at a court-leet, and acted all the year, though an information was depending againft him, in which after the year there was a judgment of *oufter*; but it did not appear there was any rightful mayor at the fame time.

[1091] And upon this ftate of the cafe the court were all of opinion, that *Goldwyer* muft be taken to have been a mere ufurper, and that in order to conftitute a man an officer *de facto*, there muft be at leaft the form of an election, though that upon legal objections may afterwards fall to the ground.

The other point was left undetermined, as not being neceffary to deliver any opinion upon, as it was not pretended that the prefiding of a mere ufurper would do, and the court had determined *Goldwyer* was no more. But they ftrongly inclined, that the prefence of a mayor *de facto* recently profecuted, and againft whom judgment of *oufter* had been obtained, would not be fufficient to authenticate the defendant's election (1). The court gave judgment for the King.

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(1) *Vide Rex* v. *J. Malden*, 4 *Burr*. 2135, 2140.

Trinity Term

* 11 Georgii 2 Regis. In B. R.

* 11 & 12 See Burr. S. C. 120. pl. 38. note to 2d ed.

Sir William Lee, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
Sir William Chapple, *Knt.*

Dudley Ryder, *Esq; Attorney General.*
John Strange *Esq*; *Solicitor General.*

Dominus Rex *verf.* Wykes et al'.

Examination of a *pauper* muft be by both the juftices. Andr. 238. S. C. more full.

IT was held, that though the complaint of a *pauper*'s fettling may be to one juftice, yet the examination ought to be by two, and thofe that fign the order of removal. *Salk.* 488. (1).

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(1) *Rex* v. *Coln St. Aldwin's, Burr.* S. C. 136. *Rex* v. *Howarth*, 2 *Bott. by Conft.* 769. *pl.* 701. S. P. But though the order be figned by the juftices feparately, and when they are in different counties, yet it is only voidable. *Rex* v. *Stotfold*, 4 *Term Rep.* 596. *Nol. Rep.* 66.

Andrews *verf.* Fulham.

What are words of condition and what of limitation. Andr. 263. S. C. more full. 2 Eq. Caf. Ab. 294. Fearne Conting. Rem. 401. 8 Vin. Abr. 103. pl. 23.

IN ejectment on the demife of *Edward Jones*, Efq; a cafe was made for the opinion of the court.

That *Robert Waith* being poffeffed of leafehold meffuages in *London*, by his will in 1686. devifed the fame to his wife for

life,

life, and after her deceafe to fuch child as fhe is now fuppofed to be *enfeint* of, and to the heirs of fuch child for ever; provided that if fuch child as fhall happen to be born fhall die before twenty-one, having no iffue, the reverfion of one third fhall go to my wife and her heirs, one third to my fifter *Elizabeth* and her heirs, and the remaining third to my fifter *Anne* and her heirs. And of this will he made his wife executrix, and foon after died, his wife not being *enfeint*. That fhe affented to the
[1093] will, and married the father of the leffor who adminiftred to her. And the defendants claim one third under *Anne* the fifter of the devifor.

After two arguments the Chief Juftice delivered the opinion of the court. That though formerly it was doubted, whether a devife to an infant *en ventre fa mere* was good; yet it is now clear, that where it is *per verba de futuro*, it will take effect. *Salk*. 239. *Godolph*. 386. (1). The words therefore would have been fufficient, had any perfon come in being capable of taking. But the objection is, that no fuch perfon ever exifted, and confequently thofe who claim in remainder on the dying of fuch perfon under twenty-one, and without iffue, can never enjoy the eftate.

Now in anfwer to this, it is obfervable, that it is no unufual thing for words of condition to be taken as words of limitation, 1 *Vent*. 202. *Salk*. 570. where there is a remainder over (2). Taking it therefore as a limitation, it muft either happen, or become impoffible. It never did happen; and therefore the queftion is, whether the limitation over of the term be fo remote, as not to be allowed. And we are all of opinion it is not too remote (3).

1 Vern. 234, 257, 304. 2 Chanc. Rep. S. C. 275. Salk. 229. 1 Eq. Abr. 189. pl. 15. 12 Mod. 278. S. C.

For this purpofe the cafe of *Maffenburg* v. *Afh* is ftrong in point, and fo is *Martin* v. *Long*, 2 *Vern*. 151. *Abr*. *Eq*. 192. And this is agreeable to the cafe of *Scattergood* v. *Edge*, where the remainder over on refufing to take the name of *Edge*, was

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(1) *Goodright* v. *Wright*, *fupra* 30. and note 3. and *Chapman* v. *Bliffet*, *Caf Temp. Talb*. 145, 150. *Doe* v. *Carleton*, 1 *Wilf*. 225. *Harris* v. *Barnes*, 4 *Burr*. 2157. *Fearne Conting. Rem*. 3 *ed*. 430.

(2) *Vide Napper* v. *Saunders*, *Hutt*. 119. *Avelyn* v. *Ward*, 1 *Vef*. 420. *Lethieullier* v. *Tracy*, 3 *Atk*. 774. *Statham* v. *Bell*, *Cowp*. 40. *Bradford* v. *Foley*, *Doug*. 63. *Horton* v. *Whitaker*, 1 *Term Rep*. 346. *Doe* v. *Shiphard*, *Doug*. 74. *Doo* v. *Brabant*, 3 *Bro. Chanc. Rep*. 393. 4 *Term Rep*. 706. S. C. in *B. R.* *Gough Calthorpe* v. *Gough*, *ib. notis*.

(3) *Vide Gore* v. *Gore*, *ante* 958. and the note.

held a limitation, and not a condition. The devife to the expected fon of *Catharine* is void, as if no fuch claufe in the will, according to *Mo.* 487. And we are the more confirmed in this opinion by my Lord *Harcourt*'s decifion in the cafe of *Weftcombe* v. *Jones*, (*a*) where upon the very claufe now in queftion, he determined that the devife over in thirds was good.

(*a*) Prec. Cha. 316. 1 Eq. Abr. 245. Gilb. Eq. Rep. 74. S. C.

The defendant therefore muft have the *poftea*, and the plaintiff pay the cofts of a nonfuit.

N. B. Mich. 19 Geo. 2. Gulliver *v.* Wicket, *the fame queftion was determined with regard to fee-fimple lands, and held on a fpecial refolution to be a good remainder in thirds, by the King's Bench,* (*b*) *though the Common Pleas had been of another opinion on a cafe made before* Eyre *C. J. and ruled by* Willes *C. J. and* Parker. (*c*).

Andr. Rep. by Vernon cited 1 Wilf. 107. 3 Burr. 1624.

(*b*) Reported. 1 Wilf. 16.

(*c*) Reported appendix to 1 Vef. 421.

Smalley *verf.* Kerfoot et ux'.

In ufum fuum proprium converterunt is not ill in trefpafs againft baron and feme (1).

TRESPASS againft *baron* and *feme* for entering the plaintiff's houfe, and taking his goods, and converting them to their own ufe. And after a verdict for the plaintiff, and general damages, it was moved in arreft of judgment, that the *feme* could not convert to her own ufe; and *Salk.* 114. was cited, where in trover it was held ill.

But upon confideration the Chief Juftice delivered the refolution of the court, that this being trefpafs, it was well enough; for the converfion here is not the *gift* of the action, as it is in trover, this action being maintainable for entring the houfe and taking the goods: and we muft take it, the damages were given only for that, as where words are joined that are not actionable, (10 *Co. Ofborn*'s cafe) the court intends, they were only added to fhew the malice of the party: and it is the fame in trover, where part is ill defcribed, we will not intend damages were given for that. *Cro. Jac.* 665.

1 L. Raym. 146, to 290. 1 Sid. 319. Bl. 790.

Agreeable to this is the cafe in *Salk.* 119. where the wife joined in a battery on her, *per quod* the hufband's bufinefs remained undone: and in a manufcript report I have feen of that cafe, *Holt* C. J. fays, I will not intend the Judge fuffered that to be given in evidence.

(1) *Bellew* v. *Scot, ante* 440. *Morfoot* v. *Chivers. ante* 631. *Bull. L. N. P.* 46.

In

In the prefent cafe therefore the plaintiff muft have judgment.

Hall *verf.* Hill et ux' adminiftratr'. At Guildhall.

Wife's owning receipt of money no evidence against the hufband.

IN an action for wages earned by the plaintiff's wife of the defendant's inteftate, the Chief Juftice would not allow the wife's owning the receipt of 20 *l.* to be given in evidence againft the hufband (1).

(1) *Vide Williams* v. *Johnfon, ante* 504.

Cole *verf.* Hawkins.

Contempt. And. 275. S. C.

A Copy of a bill of *Middlefex* was ferved on the defendant, whilft he was attending the fittings, in a caufe wherein he was defendant. And upon motion againft the attorney for a contempt, it was contended to be right, becaufe it was not an arreft, which reftrained him of his liberty. But the court faid, that the privilege was defigned as well to prevent any interruption of the bufinefs of the court, and it was equally a contempt. And they would have committed the attorney, if he had not confented to waive the proceedings, and pay cofts.

[1095]

Dominus Rex *verf.* Frederick and Tracy.

The wife of one defendant againft whom material evidence has been given cannot be a witnefs for the other on an indictment againft two.

THE defendants were indicted for a joint affault. And at the trial in *Middlefex*, it was infifted to examine the wife of the defendant *Tracy* as a witnefs for the other defendant: but there having been material evidence given againft the hufband, and it being a joint trefpafs, and impoffible to feparate the cafes of the two defendants in the account to be given of the tranfaction; the Chief Juftice refufed to let her be examined (1).

(1) *Rex* v. *Inhabitants of Cliviger*, 2 *Term Rep.* 265. *B. L. N. P.* 286. *Ed.* 1790.

Webb *verſ.* Turner.

THE declaration was of *Michaelmas* term, of an aſſault on the 18th of *October*, and an impriſonment from thence for 25 weeks. And after a verdict for the plaintiff, it was moved in arreſt of judgment, that the action was brought too ſoon, and it appeared damages had been given for an impriſonment long after the action was depending. And 2 *Saund.* 169. *Salk.* 662. 5 *Mod.* 286. *Cro. Jac.* 618. 1 *Vent.* 103. *Hob.* 189. *Carth.* 386. 3 *Lev.* 246. were cited in ſupport of the objection.

What comes under a *ſcilicet* ſhall not vitiate. Andr. 250. S. C. more full. Ante 954, 232.

But for the plaintiff it was argued, that the *continuando* in this caſe was laid under a *ſcilicet*, and therefore according to *All.* 22. *Hardr.* 4. and *Hob.* 171, 284. it will not vitiate what is properly laid in time: and that this differs from all the caſes where the time is affirmatively laid. Beſides, it is laid, that he *did* impriſon the plaintiff, and therefore reſpects a time paſt, and as to that only the evidence could be applied.

And of this opinion was the court, and the plaintiff had judgment.

Rice *verſ.* Oatfield.

ERROR of a judgment in *B. R.* in *Ireland* in an ejectment there brought on the demiſe of *Mary Rice.* Upon Not guilty pleaded, there is a verdict, and judgment for the plaintiff, and a bill of exceptions was ſealed, wherein it is ſtated, that the plaintiff made title under Sir *Stephen Rice*, who was ſeiſed in fee, and died a papiſt in *February* 1715. leaving three popiſh ſons *Edward*, *James*, and *Thomas*: that *Edward* in *January* 1716. renounced the errors of the church of *Rome*, and conformed as by law required, and died in 1720. leaving iſſue the leſſor of the plaintiff. That in oppoſition to this the defendant gave in evidence, that *Edward* in 1720. deviſed the premiſſes to one under whom the defendant claimed. To encounter which, the plaintiff inſiſted that *Edward* died a papiſt, and conſequently was by the law in *Ireland* diſabled to deviſe: and this was offered to be proved by witneſſes, which was oppoſed by

A conviction is not neceſſary to prevent the deviſe of lands by a papiſt in *Ireland* (1). S. C. Andr. 225. 235. 12 Vin. Abr. 260. pl. 12.

[1096]

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(1) But now by the *Iriſh* ſtatutes 17 & 18 *Geo.* 3. *c.* 49. *ſ.* 2. & 21 & 22 *Geo.* 3. *c.* 24. *ſ.* 1. Lands, &c. of Roman Catholics are made deſcendible, deviſable and transferable in like manner as if they were the property of Proteſtants.

the defendant, who insisted that the plaintiff should produce some record of the conviction of *Edward:* notwithstanding which the Judges admitted the evidence, and the jury found for the plaintiff.

And now it was argued on the behalf of the defendant, 1. That the plaintiff could not be allowed to contradict his former evidence; or 2. If he could, yet *parol* proof of the apostacy was not sufficient.

To the first of these it was answered, that here is no contradiction; he might conform in 1716. which is all the plaintiff shewed at first, and relapse in 1720. which is the latter proof produced. But if there was any contradiction, it is no objection, for in the case of *Pike* v. *Badmering* on a trial at bar in *B. R.* in Lord C. J. *Pratt*'s time, where the three subscribing witnesses to a will were called and denied their hands, the court admitted the plaintiff to contradict that evidence; and he supported the will against such testimony (2).

As to the second point it was answered, that the statutes 2 or 8 *Annæ* in *Ireland* do neither of them require a conviction: and it would be absurd if they did, for a man cannot be convicted after his death, and any conviction before cannot prove he died a papist, which is the circumstance inducing the disability: and as this is a mere matter of fact, it may be proved by witnesses, as all other facts are.

Besides, it was said to be a point determined in the House of Lords here, 2 *February* 1729. **Ross* v. *Close*. The appellants claimed as purchasers under Sir *George Maxwell:* the respondents insisted he was a papist, and could not dispose: in answer to which the appellants insisted he was never convicted: but the court and the Lords were of opinion, that a conviction was not necessary, to avoid any voluntary disposition; though to subject a papist to the penalties imposed by the act for a relapse, it might.

* 3 Bro. Par. Ca. 473.

And upon the authority of this case and the reason of the thing, the court here were all of opinion, that the *parol* evidence was well received; and affirmed the judgment.

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(2) *Lowe* v. *Jolliffe*, 1 *Black.* *Alexander* v. *Clayton*, 4 *Burr. Rep.* 365. *Goodtitle ex dem.* 2224. *Skinn.* 79, 413.

Dominus Rex *verſ.* Solgard.

THE defendant being captain of a man of war in commiſſion, and lying within the harbour of *Portſmouth* and the liberties of the borough, had a ſailor who hanged himſelf on board: and the coroner of *Portſmouth*, having impanneled a jury, went to the ſhip with his jury to view the body; but was refuſed admittance by the defendant, who offered to ſend the body to them on ſhore.

Where a man of war is *infra corpus com'*, the land coroner may go abroad. Andr. 231. S. C. more full.

For this I moved for an information, inſiſting that as this was not a death *ſuper altum mare*, the land coroner had the juriſdiction; and vouched 4 *Inſt.* 141. *Ow.* 122. *Mo.* 892. the ſtatute 4 *E.* 1. *de officio coronatoris.* *H. P. C.* 171. *Fleta*, *lib.* 1. *c.* 25. *Bract.* 121. 33 *H.* 8. *c.* 12. and *Articuli ſuper chartas*, and 2 *Hale's Hiſt. P. C.* 16, 54.

On the other ſide it was inſiſted for the Admiralty, that they had a coroner of their own; and it might be of ill conſequence, to admit ſo many perſons on board a man of war. But the court took notice, they did not pretend their coroner ever took inquiſitions, ſo it was contending that none ſhould be taken. And though there have been variety of opinions as to the Admiralty juriſdiction, yet it was never carried farther than a pretence to a concurrent juriſdiction: and when an officer is ready to do his duty, and is oppoſed without the duty being done; the publick juſtice is concerned, and there ought to be an information.

Caſtel *and* Carter.

UPON error from *Ireland* on a long ſpecial verdict in an information in the nature of a *quo warranto*, the conſtitution appeared to be, that the mayor of *Clonmell* was to be ſworn before his predeceſſor and the free burgeſſes, or the major part of them: that by the verdict it is ſtated, that the defendant was choſen *per maximum numerum ſuffragiorum* of the free burgeſſes, preſented *per majorem partem* of them, and ſworn *in præſentia quamplurimorum liberorum burgenſium.*

Import of the word *quamplurimi.* And. 120. 241. S. C.

It was agreed, that ſince *Pender's* caſe in the Houſe of Lords, the judgment of *ouſter* would be good, if the ſwearing was defective: and therefore I only applied myſelf to that, and inſiſted that *quamplurimi* only ſignified *very many*; and it was the ſtronger here, when it was oppoſed to the words *maximum numerum* and

Ante 581. 4 Burr. 2135

majorem

majorem partem, and it would be dangerous to let them depart from the known expreſſion to denote a majority.

Et per curiam, The proper interpretation of the word is a *good many*, and this is too looſe an expreſſion, to make a title upon againſt the crown. So the judgment of *ouſter* was affirmed.

Dominus Rex *verſ.* Gardner.

The bare keeping a gun is no cauſe of conviction.
2 Seſs. Ca. p. 385. no. 204. Andr. 255. S. C. 14 Vin. Abr. 3.

THE defendant was convicted by a juſtice of peace for keeping a gun, contrary to 5 *Ann. c.* 14. And it was objected, that a gun is not mentioned in that ſtatute, and though there are many things for the bare keeeping of which a man may be convicted; yet they are only ſuch as can only be uſed for deſtruction of the game, whereas a gun is neceſſary for defence of a houſe, or for a farmer to ſhoot crows.

E contra it was ſaid, that a gun is mentioned in 22 & 23 *Car.* 2. *c.* 25. and conſidered there as an engine; and the 5 *Ann.* having the general words *other engines*, ſhall therefore be taken to include a gun.

Sed per curiam, This was made a queſtion in the caſe of the *King* v. *King*, *Paſch.* 3 *Geo.* but never determined. And upon conſideration we are of opinion, that a gun differs from nets and dogs, which can only be kept for an ill purpoſe, and therefore this conviction muſt be quaſhed (1).

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(1) *Rex* v. *Filer*, *ante* 496. *Wingfield* v. *Stratford*, *Say. Rep.* 15. 1 *Wilſ.* 315. S. C. *Rex* v. *Hunt*, *E.* 15 *Geo.* 3. *Doug.* 683. [1] *Avery* v. *Hoole*, *Cowp.* 825. *Rex* v. *Hartley*, *Cald.* 175. *Rex* v. *Thompſon*, 2 *Term Rep.* 18.

Michaelmas Term

12 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
Sir William Chapple, *Knt.*

Dudley Ryder, *Esq*; *Attorney General.*

John Strange, *Esq*; *Solicitor General.*

Thruſtout *verſ.* Troubleſome, ex demiſſ' Parke et ux'.

THE leſſors of the plaintiff delivered three ejectments in *C. B.* and two in *B. R.* for the ſame tenements, and made the defendants attend at five aſſizes, but countermanded in time to ſave coſts: I applied to ſtay proceedings in the laſt ejectment, till coſts paid of the former, on account of the vexation. But the court would not do it, inaſmuch as coſts were not demandable by the rules of the court (1).

Coſts not demandable for a number of ejectments.
Andr. 297. S. C. But the point there is, that proceedings upon a ſubſequent ejectment ſhall be ſtaid, pending a former one brought in C. B. for the ſame lands upon the ſame title.

(1) *Smith* v. *Barnardiſton*, 2 *Black.* 904. *contra*, *et vide Short* v. *King*, *ante* 681.

Mytton *verſ.* Cock.

THE plaintiff who was owner of a *carton*, left it in the hands of the defendant, who was an auctioneer, without any particular agreement to take care of it, or re-deliver it ſafe, and

On a bare leaving a thing in another's cuſtody the law raiſes a promiſe not groſly to neglect or abuſe it.

and without any agreement for a reward. And in a ſpecial action upon the caſe for not re-delivering it ſafe, but ſuffering it to be ſpoiled, it appeared upon the evidence, that the painting was upon paper paſted on canvas, and that it was kept by the [1100] defendant in a room next to a ſtable, in which there was a wall that had made it damp and peel. And upon this evidence it was left to the jury, whether this was a groſs neglect. And they found for the plaintiff, 30 *l.* damages.

And now upon motion for a new trial, the court agreed, that in this caſe of a ſimple *depoſitum* without a reward the law raiſes only a promiſe not groſsly to neglect or abuſe the depoſit: and that therefore it was left properly to the jury, and there ought to be no new trial (1). *Strange pro quer.*'.

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(1) *Vide in Coggs* v. *Bernard*, 2 *Ld. Raym.* 913. In *Lane* v. *Cotton*, 1 *Ld. Raym.* 655. In *Gibbon* v. *Paynton*, 4 *Burr.* 2300. *Jones on Bailments*, 46. 62. &c.

Lockey *verſ.* Dangerfield.

No prohibition for *You are a bawd* (1). Ardr. 286. S.C. 17 Vin. 591. n.

LIBEL in the ſpiritual court for theſe words, "You are a bawd." And upon motion for a prohibition, *Raym.* 115. 3 *Mod.* 74. were cited, to prove that an action would lie. But the court upon conſideration diſcharged the rule; for it is not a charge of keeping a bawdy-houſe, which is puniſhable as a temporal offence. 1 *Roll. Abr.* 44. *pl.* 8. And an action will lie for thoſe words, but for the word *Bawd* only it will not, that being perhaps no more than a ſolicitation of chaſtity. 1 *Sid.* 241. 1 *Vent.* 53. *Salk.* 552. and *Trin.* 4 *Annæ*, *Regina* v. *Pearſon*, who was convicted at *Hicks's Hall* for being a common bawd, and procuring men and women to meet and commit fornication: the court on error reverſed it, ſince it might only be in a private room, and be but a ſollicitation of chaſtity, and not amount to the temporal offence of keeping a bawdy-houſe to the nuſance of the neighbourhood. And the ſame point as this was determined in *B. R. Hil.* 3 *Geo.* 1. *Savil* v. *Kirby*.

Salk. 382. 2 L. Raym. 1197. S. C. cited Fort. 98.

10 Mod. 384. Cited in And. 300.

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(1) *Vide Hodges* v. *Corbet*, *ante* 545. *Carſlake* v. *Mapledoram*, 2 *Term Rep.* 473.

Peyton *verſ.* Burdus.

Practice.

THE interlocutory judgment was ſigned in *Trinity* term 1737, and in *Auguſt* 1738, a writ of inquiry was executed upon eight days notice; which was ſet aſide as irregular: and held, that where a term's notice of trial is required, there muſt at the ſame diſtance of time be the like notice of executing a writ of inquiry (1).

(1) See *Bogg* v. *Roſe*, *poſt.* 1164. S. P. But this is to be underſtood a voluntary delay on the part of the plaintiff, without the defendant's aſſent. *Boſworth* v. *Philips*, 2 *Black.* 784. *Walter* v. *Stewart*, *ib.* 918. *Hayley* v. *Riley*, *Doug.* 71.

Dominus Rex *verſ.* Haddock.

Practice on indictment of mayhem.

THE defendant was indicted of a mayhem. And it being laid as uſual *felonice*, the queſtion was, whether the defendant muſt be brought to the bar, or whether his plea might be delivered in the office: and the court held, that there was no [1101] occaſion of going to the bar, it not being neceſſary to lay it ſo now, that life and member is not affected, though the practice has been to draw the indictments in the old form.

Clowes *verſ.* Brooke, an Executor.

What the proper replication to a plea of infancy in *aſſumpſit*.

Andr. 277. S. C.

IN *aſſumpſit* for a farrier's bill, the defendant pleaded, that the teſtator was an infant: the plaintiff replied, that the demand was for looking after his horſes, and that the work was neceſſary for the horſes. And on demurrer the court held, that the replication was ill; for it ſhould have been only a general replication, that it was neceſſaries for the infant, and left it to evidence, where the circumſtances of his health and fortune would be conſidered (1); and though the work might be neceſſary for the horſes, yet *non conſtat* the horſes were neceſſary for the infant. *Judicium pro defendente.*

(1) *Vide Huggins* v. *Wiſeman*, *Carth.* 110. According to the report in *Andrews* the replication might have been, "that the phyſick, &c. was for the horſes of the defendant, kept by him for his neceſſary uſe." See 5 *Com. Dig. Pleader*, (2 W. 22.) 644.

Dominus Rex *verſ.* Bryan.

An excuſe under a proviſo need not be taken notice of in a conviction (1). Andr. 289. S. C. Cited poſt. 1119.

THE defendant was convicted on the gin act, and an exception was taken, that there was no averment, that it was not ſold to be uſed in medicine: and the caſes on the game act were mentioned, where in convictions it is neceſſary to exclude all the qualifications for killing game.

Strange contra inſiſted, that the reaſon of that was becauſe thoſe were in the enacting clauſe, whereas this about medicine comes in by way of proviſo, and is by way of defence to be ſhewn on the defendant's part. And for that purpoſe he cited *Mich.* 11 *Geo.* 1. *Rex* v. *Theed*; where in a conviction for obſtructing an exciſe-officer on 8 *Ann. c.* 9. it was objected, that it not being averred to be in the day, it ſhould have been ſhewn that there was a conſtable preſent, which is made neceſſary in the night; but held well, and its being in the night, ſhould have been ſhewn on defendant's part.

Ante 608.

1 Keb 20.
1 Lev. 26.

Et per curiam, This is brought within the general enacting clauſe: and the true diſtinction is, where the extenuation comes in by way of proviſo, or exception. The conviction was confirmed.

(1) *Rex* v. *Ford*, *ante* 555.

Smith *verſ.* Dudley.

Practice, as to ſpecial bail in counties palatine.

BY 11 & 12 *W.* 3. *c.* 9. ſheriffs are not to take ſpecial bail in *Wales*, or counties palatine, on proceſs from *Weſtminſter-Hall*, unleſs a debt of 20*l.* is ſworn to. In this caſe ſpecial bail was taken for 12*l.* upon proceſs into *Lancaſhire*: and upon a motion for common bail, it was inſiſted, that the act 12 *Geo.* 1. *c.* 29. about not holding to bail under 10*l.* having only an exception of *Scotland*, was intended to extend to all other places, and conſequently was a virtual repeal of 11 & 12 *W.* 3. *Sed per curiam*, They are not inconſiſtent, for 12 *Geo.* 1. does not ſay, you ſhall have bail for 10*l.* but that you ſhall not have bail under 10*l.* whereas in 11 & 12 *W.* 3. there are negative words: and the oath here being only to 12*l.* the plaintiff was not intitled to ſpecial bail, and the rule for common bail muſt be abſolute (1).

(1) *Lord Molineaux* v. *Charles*, *Barnes* 69. *Rayner* v. *Brough*, *Barnes* 89. S. P. in *C. B.*

Dominus Rex *verſ.* Armſtrong.

AFTER a verdict *pro rege* in an information in nature of a *quo warranto*, the proſecutor gave the uſual four day rule in the office, and ſigned an interlocutory judgment. But before coſts taxed, or any final judgment ſigned, the defendant came to move for a new trial. And the court held, he was too late; for though theſe motions may be received, even in another term, yet that is upon a ſuppoſition, that nothing has been done ſince the verdict: and ſo it was held *Trin.* 10 *Geo.* 1. *Rex* v. *Pollard* (*a*), and *Mich.* 9 *Geo.* 1. *Gilman* v. *Smith*, where on the plea ſide the four days rule was out, the court held the defendant was not too late, there being no judgment ſigned; and that ſigning judgment was the material act (1), this has made all Attornies General ſign judgment as ſoon as they can by the rules of the court.

No new trial can be moved for on the crown ſide after the ſigning an interlocutory judgment.

(*a*) Rep. 8 Mod. 264. 2 L. Raym. 1370. 2 Seſſ. Ca. 10. pl. 17. See Sel. Caſ. Evid. 59.

(1) *Vide Rex* v. *Gibſon*, *ante* 968. *Rex* v. *Gough*, *Dougl.* 791. and ſee *Rex* v. *D. Holt*, 5 *Term Rep.* 436. where it is conſidered as ſettled, that the defendant can not of right move for a new trial after the firſt four days. But that if it appear to the court at any time before judgment that injuſtice has been done him, they will grant a new trial.

Bertie *verſ.* Clutterbuck.

AFTER judgment of a year's ſtanding in *B. R.* the plaintiff ſued out a *ſcire facias*, on which he obtained an award of execution: of this only the defendant brought error in the Exchequer Chamber: and it was held, that 27 *Eliz.* *c.* 8. does not extend to this caſe, and leave was given to take out execution.

Error does not lie in the Exchequer Chamber on an award of execution only.

Andr. 287. S. C. by the name of Crow v. Maddock. 5 Mod. 229. Salk. 263. Comb. 394. 1 L. Raym. 97. Holt 271. 12 Mod. 105. Yelv. 157. 1 Vent. 38. 168. Cro. Jac. 171. Cro. Car. 218.

Dominus Rex *verſ.* Miller. [1103]

BY a private act for erecting a workhouſe in *Glouceſter*, power is given to the governors, to apprehend any rogues, vagrants, ſturdy beggars, or idle and diſorderly perſons, within the city: the defendant was committed for being a diſorderly perſon: and upon a *habeas corpus* was diſcharged. For *per curiam*, He muſt be idle as well as diſorderly; being drunk is

A perſon muſt be idle as well as diſorderly to be committed for a vagrant.

being diforderly, and yet it was never intended that this act fhould be put in execution againft perfons of all ranks under fuch a circumftance.

Garland, qui tam, *verf.* Burton.

No information lies at the affizes for non-refidence (1). Andr. 27. 175. 291. S. C. 6 Vin. Abr. 341. pl. 18.

AN information was brought at the affizes on 21 *Hen.* 8. *c.* 13. againft the defendant for non-refidence: and the action is thereby given to him that will fue in any of the King's courts by bill, plaint, or information, in which no effoin is to be allowed. And upon demurrer the court held, that it would not lie at the affizes, but muft be brought in *B. R.* according to *Cro. Car.* 112. 146. *Het.* 101. Sir *W. Jones* 198. *Hutt.* 98. For 21 *Jac.* 1. *c.* 17. never intended to give a new jurifdiction to the affizes in cafes where they had it not before. *Vide Salk.* 372, 373. And it was faid, that *Farthing, qui tam,* v. *Markham, Mich.* 13 *Geo.* 1. (*a*) was never argued, but the rule was only to fhew caufe, and never ftirred again.

(*a*) Andr. 292.

Information not quafhable on motion.

N. B. Before any demurrer there was a rule to fhew caufe why the information fhould not be quafhed, but the court refufed to enter into the confideration of it upon fuch a motion (2).

Mich. 13 *Geo.* 2. the court made a rule on 18 *Eliz. c.* 5. for the profecutor to pay cofts, though this was not a judgment on the merits (3).

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(1) *Leigh* v. *Kent*, 3 *Term Rep.* 302. *Bevan* v. *Williams*, 3 *Term Rep.* 365. S. P. and fee *Balls qui tam* v. *Atwood*, 1 *H. Black.* 546.

(2) *Rex* v. *Jacomb*, *ante* 953. But it has been held, that an information may be quafhed for defect of jurifdiction upon motion. *Rex* v. *Williams*, 1 *Burr.* 385. *Rex* v. *Wefley*, cited *ib.* 389. *per Denifon* J. *Rex* v. *Holmes*, *Andr.* 216. feems *contra*.

(3) See *Hullock on Cofts* 203.

Theed *verf.* Lovell. At Guildhall.

Indorfement of note ftruck out at nifi prius.

WHEN the note was delivered in, the plaintiff's name was upon it. And the Chief Juftice permitted it to be ftruck out in court, it being only an indorfement in blank.

Dominus Rex *verſ.* Ellis. At Guildhall.

N an indictment for perjury in evidence given at the trial of an ejectment, the Chief Juſtice refuſed to let any of ·fendants in the ejectment, againſt whom the verdict was , be examined as witneſſes for the proſecutor. And it was › have been ſo ruled on conference with all the Judges. , 1. *Rex* v. *Newens* (1). Defendant in ejectment no witneſs on indictment for perjury.

Vide Rex v. *Nunez, ante* 1043. his caſe ſeems over-ruled r v. *Broughton, poſt.* 1229. *Abraham* v. *Bunn*, 4 *Burr.* by which it appears eſta-l, that a witneſs ſhall not be d incompetent through in- unleſs he either is, or con- himſelf liable to gain or r the event of the verdict, eſs it may be given in evi- in another action for him. *Carter* v. *Pearce*, 1 *Term* 164. *Bell* v. *Harwood*, 3 *Rep.* 308. *Bent* v. *Baker*, *ib.* 27. But there ſeems to be a diſtinction between an indictment at common law for perjury, and one upon 5 *El. c.* 9. For by the 14th ſect. of that ſtatute, the party injured is in caſe of conviction intitled to a moiety of the penalty, and therefore ſeems incompetent, as being an evidence for his immediate intereſt, in the ſame way as an informer where he is intitled to part of the penalty. *Rex* v. *Tilly, ante* 316. *Gilb. Law of Evid.* 3 ed. 127.

Yates *verſ.* Boen. In Middleſex.

lebt upon articles, the defendant pleaded *Non eſt factum*, d upon the trial offered to give lunacy in evidence. The Juſtice at firſt thought it ought not to be admitted, upon ıle in *Beverley*'s caſe, 4 *Co.* 123. *b.* that a man ſhall not y himſelf: but on the authority of *Smith* v. *Carr*, 5 *July* , where Chief Baron *Pengelly* in the like caſe admitted it, n conſidering the caſe of *Thompſon* v. *Leech*, in 2 *Vent.* 198. hief Juſtice ſuffered it to be given in evidence. And the iff upon the evidence became nonſuit (1). Lunacy may be given in evidence on *non eſt factum.*

So alſo exceſſive drunken- t the time of ſigning the ıay be given in evidence up- iſſue. *Cole* v. *Robbins, Bull. P.* 172. and a woman may er coverture in evidence. *Delaune*, 3 *Keb.* 228. *Gilb. Law of Evid.* 165. 3 ed. But that which will only prove the deed to be voidable, as infancy, cannot be taken advantage of upon it. *Vide Gilb. Law. of Evid.* 3 *ed.* 165. *Bull. L. N. P.* 172. 12 *Vin Abr.* 181.

At the Council, 9 December 1738.

Present the Two Chief Justices.

A Mahometan ſworn upon the Koran. *Omichund* v. *Barker*, in *Canc'* 23 *February*, 18 *Geo.* 2. 1 Wilſ. 84. 1 Atk. 19. S. C.

ON a complaint of *Jacob Fachina* againſt General *Sabine*, as governor of *Gibraltar*; *Alderaman Ben Monſo*, a *Moor* was produced as a witneſs, and ſworn upon the *Koran*. I made no objection to it (1).

(1) So alſo he may be a witneſs in a proſecution for a capital offence. *John Morgan*'s caſe, *Leach Cro. Caſ.* 58.

Hilary Term

12 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
Sir William Chapple, *Knt.*

Dudley Ryder, *Esq*; *Attorney General.*

John Strange, *Esq*; *Solicitor General.*

Smith ex demiss' Dormer *vers.* Parkhurst et al'.

UPON a trial at bar in ejectment, the parties agreed to a special verdict as to a point of law arising upon a family settlement. But there being a question of fact in which they did not agree, that was left to the jury, who found it for the plaintiff against the weight of the evidence.

New trials may be had in ejectment, and after a trial at bar (1). Andrews 315. very full.

The defendant moved for a new trial, and three objections were made. 1. That it was after a trial at bar. 2. That it was in the case of a special verdict. And 3. That it was in ejectment. These points were solemnly argued at the bar, and the court took time to consider of them.

And as to the first, the court held, that in the case of a verdict against evidence, its being a trial at bar was no objection to a

(1) *Vide Bright* v. *Eynon*, 1 *Burr.* 395. *Richards* v. *Syms*, 2 *Atk.* 319. *Baker* v. *Hart*, 1 *Vez.* 28. *Doe ex dem. Foster* v. *Williams*, *Cowp.* 621.

new trial, which had been granted in the cafe of *Bewdley*, and in the cafe of Sir *Chriftopher Mufgrave* v. *Nevinfon*. *Paf.* 10 *Geo.* 1. *ante* 584.

As to the fecond objection they gave no opinion, it not being neceffary to determine it upon the rule they intended to pronounce in this cafe.

[1106] Sir T. J. 224. Salk. 648. Carth. 507. Holt 762.

As to the third objection, they ftrongly inclined, that the verdict not being final in ejectment, a new trial ought not to be granted, but upon very particular circumftances, where juftice is no otherwife to be attained. And they obferved, that no cafe had been cited of a new trial in ejectment after a trial at bar.

But the point upon which the new trial in this cafe was denied was, becaufe they faid the evidence was doubtful, and in fuch a cafe a verdict at bar ought to ftand (2).

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(2) *Vide Afbley* v. *Afbley*, *poft*. 1142.

Vaughan *verf.* Browne.

An adminiftration *pendente lite* may be pleaded *puis darrein continuance* to juftify a retainer (1). Andr. 328. S. C.

THE defendant is fued as executor: and pleads a judgment to himfelf in the life of the deceafed, and a retainer: the plaintiff replies, that he was executor only *de fon tort*: and the defendant, by way of plea *puis darrein continuance* rejoins, that he has fince obtained letters of adminiftration. And upon demurrer it was objected, that this is to abate the plaintiff's writ, which was well brought, by matter fubfequent not depending on any act of the plaintiff's: and that the rejoinder was a departure from the plea. But the court held, it was well enough; for the firft plea does not fay there was a will, and the defendant could not at that time do otherwife than admit an acting as executor. And they faid it would be very hard to lay it down, that if a man who fues for adminiftration is oppofed, and the caufe runs out into any length, that the acting *pendente lite* fhould be conftrued fuch a wrongful executorfhip, as can never be purged, fo as to give him the benefit of retaining: befides thefe pleas *puis darrein continuance* begin with a *relicta verificatione* of the former, which fhews it may be departed from (2). The defendant had judgment.

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(1) *Vide Williamfon* v. *Norwich*, *Sty*. 337. 1 *Roll. Abr.* 923. L. *pl.* 12. and *Curtis* v. *Vernon*, 3 *Term Rep.* 587.

(2) *Vide Barber* v. *Palmer*, 1 *Ld. Raym.* 693. *Salk.* 178. 12 *Mod.* 539. S. C. *Jenk.* 160. cafe 2. *Stoner* v. *Gibfon*, *Hob.* 81. *Moore* 871.

Marsh *verf.* Yellowly.

IN an action brought by the plaintiff as executor of an attorney, one count was, that the testator in his life was employed by the defendant and did business, but dying in the midst of it the plaintiff caused the same to be finished, and the defendant in consideration thereof undertook to pay. The plaintiff was nonsuit at the trial. And now the defendant moved for costs, upon the authority of the cases, where it has been held, that if the plaintiff might have declared upon a promise made or a wrong done to himself, he shall pay costs, it being a cause of action arising in his own time.

Where an executor shall pay costs on a nonsuit.
Andr. 356. much fuller. Bull. L. N. P. 332. S. C.
Ante 682.

Et per curiam, (upon consideration) We are all of opinion, that the plaintiff ought to pay costs. The reason why executors have been excused, arises from the words of 23 *H.* 8. *c.* 15. which speaks only of contracts made *with*, or wrongs done *to* the plaintiff: here is a demand for which the executor might undoubtedly maintain an action in his own right: and it falls within the reason of paying costs where an executor declares upon a conversion in his own time (1). [1107]

(1) *Vide Cockerill* v. *Kynaston*, 4 *Term Rep.* 277. and the various cases cited in *Hullock on Costs* 174, &c.

Archer *verf.* Snatt.

THE defendant purchased the equity of redemption, and had possession of the estate: the lessor of the plaintiff was a mortgagee, and had also lent money on a bond. And the court being moved to stay proceedings on payment of the mortgage money, with interest and costs; it was referred to the master. And the lessor insisting to be paid the bond, before he would re-convey, the matter was specially reported. And the court was of opinion, that this not being an application by an heir (1), but the mortgagor or his assignee of the equity of redemption; they could not allow the bond debt to be brought in;

Proceedings on a mortgage may be staid by the purchaser of the equity of redemption, without payment of a bond.
Andr. 341. S. C. more full.

(1) That the heir must have paid the debt due by bond as well as that by mortgage. *Vide Shuttleworth* v. *Laywick*, 1 *Vern.* 245. *Coleman* v. *Winch*, 1 *P. Wms.* 776. *Powis* v. *Corbet*, 3 *Atk.* 556. *Troughton* v. *Troughton*, 1 *Ves.* 87.

but

but were to act in this case according to the rules of a court of equity, where a redemption is constantly decreed upon payment of the mortgage money only (2). And it was said to have been so held *Hil.* 11 *Geo.* 2. *in B. R. Wood ex dimiss' Cowhurst* v. *Mortimer et al'*, and *Eq. Cases* 325.

(2) *Challis* v. *Casborn*, *Prec. in Chanc.* 407. *Coleman* v. *Winch*, 1 *P. Wms.* 775. *Morret* v. *Paske*, 2 *Atk.* 53. *Anon.* 2 *Vez.* 652. *Bingham* v. *Gregg*, *Barnes* 182. acc. *Baxter* v. *Manning*, 1 *Vern.* 244, *videtur contra*; and see also upon this subject *Anon.* 2 *Vern.* 177. *Demainbray* v. *Metcalf*, *Prec. Chanc.* 419. *Vanderzee* v. *Willis*, 3 *Bro. Chan. Ca.* 21.

Case of the Vicar of Dartford.

Clergyman not obliged to be *expenditor* of sewers. Andr. 335. by the name of Chambers's case much fuller.

THE court granted him a writ of privilege against serving the office of *expenditor* to the commissioners of sewers, on the authority of 1 *Mod.* 282. 1 *Vent.* 105. 1 *Lev.* 303. 2 *Keb.* 603. 6 *Mod.* 140. Though it was insisted, that this was an office which might be executed by deputy.

Dominus Rex *vers.* Lord Offulston et al'.

Information granted for taking away a young woman from her guardian and marrying her. Andr. 310. S. C. much fuller. 14 Vin. Abr. 203.

ON a motion for an information, it appeared, that the defendants contrived to get a young lady out of the custody of her guardian assigned in Chancery, and marry her, and that a coach, &c. was prepared, into which she voluntarily went, and was carried into *Sussex*, and there married.

[*1108]

*And the court granted the information; though in 4 *Mod.* 144. it is said not to be an offence at common law: for they said, it was certainly a conspiracy (1); and 1 *Sid.* 387. 1 *Lev.* 257. and 2 *Mod.* 130. are in point. Besides, they inclined, that though she went voluntarily, yet it was a taking and conveying of her within the meaning of *sect.* 3. of 4 *Ph. & Mary*, *c.* 8. which puts the case of her consenting, and lays a penalty upon her.

In this case it appeared, the court of Chancery had committed the defendants for a contempt: but the court granted the information notwithstanding, and Mr. Attorney General refused a *nolle prosequi*.

(1) *Vide Rex* v. *Thorp*, *Com.* 26. *Holt* 333. 5 *Mod.* 221. *Comb.* 456. S. C. *Reg.* v. *Blacket*, 7 *Mod.* 39.

Jones *verſ.* Harris. In Middeſex.

IN treſpaſs againſt ſix defendants, three ſuffered judgment to go by default, and the other three pleaded Not guilty: the *venire* went *tam ad triandum quam ad inquirendum:* and on evidence it appeared, that the treſpaſs was done after the action brought, it being a general *memorandum.* Whereupon the Chief Juſtice directed the jury to acquit the three defendants, but ſuffered the plaintiff to go on and aſſeſs his damages as to the others.

Though defendants who plead to iſſue are acquitted, yet damages may be aſſeſſed againſt defaulters. Ante 507. (1).

(1) *Creſſy* v. *Webb* & *al'*, *poſt.* 1222. S. P.

Pitts *verſ.* Evans. In C. B.

A Prohibition was granted to a ſuit in the ſpiritual court by the clerk of *St. Magnus* for 1 *s.* 4 *d.* aſſeſſed on the defendant's houſe at a veſtry in 1672, to be paid to the pariſh clerk. For *per curiam,* He is a temporal officer (1): or if not, yet he could not ſue there for ſuch a rate; for if it is due by cuſtom he may maintain an *aſſumpſit,* if not, a *quantum meruit,* or a bill in equity.

Prohibition to ſuit by a clerk of a pariſh for fees. 1 Barnes 428. Prac. Reg. 356. But not S. P. 13 Vin. 155. pl. 7.

(1) *Peake* v. *Bourne*, *ante* 942.

Easter Term

12 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
Sir William Chapple, *Knt.*

Dudley Ryder, *Esq*; *Attorney General.*
John Strange, *Esq*; *Solicitor General.*

Croft *verf.* Pawlet.

Though figning in the devifor's prefence is not mentioned in the atteftation, yet it may be a good execution. 8 Vin. Abr. 128. pl. 4. 2 Eq. Ca. Abr. 765. pl. 18.

ON a trial at bar in ejectment, the defendant made title under a will, the atteftation of which was in thefe words, "Signed, fealed, publifhed and declared as and for his laft will, "in the prefence of us *A. B.* and *C.*" The will was in 1723, and the witneffes all dead, and their hands proved in common form: but then it was objected, that this was not an execution according to the ftatute of frauds; and the hands of the witneffes could only ftand as to the facts they had fubfcribed to, and figning in the prefence of the teftator was not one (1). But the

(1) *Vide Shires* v. *Glafscock*, *Salk.* 688. *Longford* v. *Eyre*, 1 *P. Wms.* 739. *Dormer* v. *Thurland*, 2 *P. Wms.* 510. *Right* v. *Price*, *Doug.* 241. *Caffon* v. *Dade*, 1 *Bro. Chan. Ca.* 99. But it is not neceffary that the teftator fhould actually fign his will in the prefence of the witneffes. *Lee* v. *Libb*, 1 *Show.* 68. *Stonehoufe* v. *Evelyn*, 3 *P. Wms.* 254. *Gryle* v. *Gryle*, 2 *Atk.* 176. *Jones* v. *Lake*, *ib. n.* *Grayfon* v. *Atkinfon*, 2 *Vez.* 454. *Carlcton* v. *Griffin*, 1 *Burr.* 554. *Ellis* v. *Smith*, *Doug.* 244. (n.) to 3d. edition.

the court, on the authority of a case in *C. B.* (2) said it was evidence to be left to a jury of a compliance with all circumstances. And a verdict was given for the will.

(2) *Hands* v. *James, Com. Rep.* 530. 2 *Eq. Ca. Abr.* 764. *pl.* 16.

Dominus Rex *verf.* Hebden.

ON an information in nature of a *quo warranto* against the defendant as bailiff of *Scarborough*, he made title as elected under the bailiffship of *Batty* and *Armstrong*; and upon issue joined, whether they were bailiffs or not, a record of a judgment of *ouster* against them was read in evidence. And upon motion for a new trial, it was held, that it was properly admitted in evidence (1), and was so done lately in a trial at bar relating to the corporation of *Orford* (*a*). And a new trial was denied.

Evidence. Andrews 389. S. C. at large.

[1110]

(*a*) Vide Andr. 391.

(1) It was held admissible but not conclusive evidence. *Andr.* 392. *Bull. L. N. P.* 231. *Rex* v. *Grimes*, 5 *Burr.* 2601. S. P. But that it is conclusive unless you can impeach the judgment as obtained *per fraudem*. *Vide* the opinion of Lord *Kenyon* C. J. in *Rex* v. *The Mayor of York*, 5 *Term Rep.* 72.

Wray *verf.* Lister

IN debt upon an old judgment, the plaintiff laid the *ad damnum* to 10 *l.* the jury gave interest, which came to 30 *l.* and for that and costs judgment was entered up. And after error brought, the plaintiff moved to have liberty to remit the *surplus*, and enter judgment for 10 *l.* only. And *Page* J. was for doing it; but the Chief Justice and the other two held it could not be done in another term. And the instances of reversing judgments for this fault, shew it was never thought to be amendable (1). *Yelv.* 45.

The plaintiff cannot enter a *remittit* in another term. Andrews 384. S. C. much fuller.

(1) *Chevely* v. *Morris*, S. P. in *B. R.* and in *Cam. Scacc.* 2 *Black.* 1300. A motion had been made in the preceding term to amend the declaration by laying the damages there in a sum greater than that for which the judgment was entered up, but it was denied. *Andr.* 351.

Dominus Rex *verf.* Inhabitantes de Woolftanton.

One of the jufti-ces to allow a binding muft ap-pear to be one of the *quorum.* Burr. Sett. Ca. 129. Bott 145. c. 265. Andrews 362. 371. S. C.

UPON a fpecial order of feffions the queftion was, whether a boy bound out by juftices (the boy being no party to the indenture) had gained a fettlement, it being only ftated that his binding was allowed and approved by two juftices. Now the 43 *Eliz. c.* 2. requires that one of them fhould be of the *quorum*. And for this omiffion the court held, that the feffions had done wrong in determining it a fettlement, and quafhed the order (1).

(1) The point is rightly reported here, but the judgment of the court was, that the order of feffions made for quafhing the original order of removal, be *affirmed*: *Vide Burr. S. C.* 131. And fee 26 *Geo.* 2. *c.* 27. which removes this objection.

Dominus Rex *verf.* Inhabitantes de All Saints in Derby et al'.

Variance. 5 Com. Dig. Pleader, (3B.9.) 702.

A Writ of error was brought of a judgment by the commiffioners of *oyer* and *terminer* for the county of *Derby* on an indictment for not repairing a highway. And the indictment fet forth, that the inhabitants of fuch part of the three parifhes in *Derby* as the way lies in are bound to repair. The writ of error was of a judgment on an indictment againft the inhabitants of the three parifhes in general, *ad grave damnum* of them: and for this variance the writ of error was quafhed: and *Mich.* 3 *Geo.* 1. *Dawfon et al'* v. *Lowther* (a) was cited, where in trefpafs againft four, two were convicted, and two acquitted; error brought *ad grave damnum* of three, and quafhed.

(a) Rep. 2 Vin. Abr. 375.

Trinity Term

12 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
Sir William Chapple, *Knt.*

Dudley Ryder, *Esq*; *Attorney General.*
John Strange, *Esq*; *Solicitor General.*

Dominus Rex *verf.* Dr. Bettefworth.

MANDAMUS to grant adminiftration to Mr. *Bridgen*, the late hufband of lady *Bellamont* deceafed. The dean of the Arches returned, that a fuit had been commenced before him between Mr. *Bridgen* and a fon of the deceafed, who claimed to be her executor under a will made by her purfuant to a deed executed before marriage, whereby the hufband agreed fhe fhould have power to make a will and difpofe of her eftate, which deed Mr. *Bridgen* had confeffed, and thereupon fentence had been given for the validity of the difpofition, but not for any executorfhip created thereby; and thereupon a new fuit was inftituted by the daughter againft the fon and Mr. *Bridgen* for adminiftration with the will annexed, which is ftill depending (2).

Where the hufband has departed from all intereft in the wife's fortune he fhall not have adminiftration. Where a will has been made by a feme covert under a power given her by deed before marriage, a return of a fuit pending for adminiftration to a mandamus to grant it to the hufband is good. (1)

(1) But it feems fomething muft appear to have been done by the hufband to exclude himfelf. *Vide Rex* v. *Bettefworth, poft.* 1118.

(2) *Rex* v. *Bettefworth*, 2 *Barnard.* 420.

 And

And upon confideration the court declared, that no peremptory *mandamus* ought to go: for though generally the hufband is intitled to the adminiftration as next of kin; yet that is in refpect of the intereft he has in the eftate, and becaufe no body is *in æquali gradu*, and that is the reafon why adminiftrations are fo
[1112] often granted to a refiduary legatee. 2 *Lev.* 56. 1 *Vent.* 219. 1 *Sid.* 281. And though ftrictly fpeaking, this is no will, but rather an appointment which is to operate in equity; yet the true queftion is, whether this is fuch an inteftacy as is within the meaning of the ftatute. And the law, particularly 29 *Car.* 2. *c.* 3. confiders *femes coverts* as having fome right to difpofe of their effects, which can only be by the agreement of the hufband, which appears in this cafe: and this differs greatly from the cafe of *Cullum*, *Hil.* 4 *Geo.* 2. where the power was only as to a leafehold eftate, whereas fhe might have other effects. The matter is properly under the confideration of the fpiritual court to whom to grant the adminiftration, and there is no reafon for us to interpofe, and therefore the return muft be allowed.

Ante 891. Poft. 1118.

Dominus Rex *verf.* Bofworth.

It is a good cuftom for perfons to be admitted to freedom to be obliged to fwear on the New Teftament (1). It is not unreafonable that the oath fhould be required to be taken before the admiffion. In fetting out in the return to a mandamus, a cuftom to hold courts for the admiffion of freemen, the place is fufficiently alleged if it be averred to be held within the city, and the time when need not be fet out.

MANDAMUS directed to the chamberlain of *London*, fuggefting, that every perfon of twenty-one years old, born the fon of a freeman, and entered of one of the companies, hath a right to be admitted to the freedom of the city; and that *Abraham Rathom* being fo intitled, was prefented in order to be admitted, but hath been refufed; the chamberlain is therefore required to admit him, or fhew good caufe to the contrary. To this he returns, that the corporation confifts of feveral guilds and fraternities, into one of which perfons intitled to freedom are to be admitted; and that there is fuch a cuftom as fuggefted for admitting freemens' fons; and that within the city there is, and time out of mind has been, a certain ancient court held before the chamberlain or his deputy for the admiffion of fuch perfons, and that there is another cuftom for their taking the oath of a freeman on the New Teftament. Then he admits the title and

(1) But Quakers are exempted by 7 & 8 *W.* 3. *c.* 34. 8 *Geo.* 1. *c.* 6. & 22 *Geo.* 2. *c.* 24. *Vide Rex* v. *Mayor of Lincoln*, 5 *Mod.* 402. Where a return to a *mandamus* to admit *A.* to the freedom of that city, ftating that *A.* was a Quaker, and "refufed to take the ufual oath according to the cuftom of the city," was difallowed, and it is further ftated that Quakers are ufually admitted to their freedom in *London* upon their folemn affirmation. 12 *Mod.* 190. *Carth.* 448. S. C. *Vide* alfo *Rex* v. *Turkey Company*, 2 *Burr.* 999.

appli-

application of *Rathcm* for his freedom; but says that upon tendering him the oath on the New Testament, he refused to take it; that he was not a Quaker, nor had ever since applied to be admitted: *et ea de causa*, he had not admitted him.

This case was three times argued at the bar. And the question about the right of *Jews*, and the nature of their toleration here, was gone into at large. But the court giving no opinion upon that point, it is to little purpose to take notice of it.

And this term the Chief Justice delivered the resolution of the court.

The first objection taken was, that in setting out the custom to hold courts for the admission of freemen, no place or time where and when such court is to be held, is mentioned. Now as to this we are all of opinion, the return is sufficient. As to place; it is averred to be held within the city, and that is enough, without saying in what part of the city; for a member of the city must take notice of it, and find it out; and the custom of coming to *Blackwell-hall* with cloth was held good in 5 *Co.* 63. though the situation of it was not described. [1113]

And as to time, we think it good upon the same foundation. 5 *Co.* 83. a custom for the tenant to present a feoffment at the next court, else it shall be void, was held good, though the time of holding such court did not appear. In many places and corporations they have no stated times of holding courts, but call them occasionally.

The next objection was, that the oath is required to be taken before the admission, and say they, that is unreasonable. But to this we answer, that the giving the oath is the admission itself. And *Pasch.* 13 *Ann. Regina* v. *City of London*, it was held a good return, that the party was sworn in: a custom is not to be avoided by a supposition, the officer will not do his duty; the steward may not inroll, or the copyholders present, and yet customs requiring that are good. 5 *Co.* 84. Besides, if any further act was necessary after swearing, the party is not without remedy; for he may have a *mandamus*, which is not to be called a modern remedy, for it is founded on the principles of the common law.

The last objection made is, that it is not reasonable to confine the oath to the New Testament in trading cities, where a man's religion is of no consequence, and ought not to interfere. But the question before us is not whether upon a proper applica-

cation the *Jews* may not be allowed to fwear upon the Old Teftament, as they do when they give evidence; but whether this cuftom of taking an oath in the ufual manner is unreafonable upon the face of it. My Lord *Coke* in 3 *Inft.* 165. defines an oath to be, an affirmation or denial by any Chriftian, and the law takes no notice of diffenting from an eftablifhment. My Lord Chief Juftice *Holt* in *Larwood*'s cafe fays, there has always been an eftablifhed religion, the ridiculing of which is punifhable; and that alfo was the opinion in *Woolfton*'s cafe, *Pafch.* 3 *Geo.* 2. In 1 *Vent.* 293. *Hale* fays, it is part of the law of the land; and in a manufcript of his which I have feen, he fays that Chriftianity came in here by external fpiritual force, and difcipline, was introduced as a cuftom, and is part of the law.

L. Raym. 32.

Ante 834.

Ante 1104.

It was faid, that the law does not require the New Teftament in all cafes, particularly as to evidence given by *Jews*. But the reafon of that is, becaufe all courts defire to have the beft fecu- [1114] rity they can for the truth of the evidence; and therefore as it is known they have a more folemn obligation to fpeak the truth, when fworn on the Old Teftament, it is for that reafon allowed. The common regular way of fwearing is on the New Teftament, and fhall we fay that a cuftom requiring fuch a regular oath is bad? The 1 *Eliz.* *c.* 1. § 19. takes notice of an oath upon the Evangelifts, and the abjuration oath (till altered for the *Jews* by 10 *Geo.* 1. *c.* 10. § 18.) runs, upon the true faith of a Chriftian.

We therefore think this a good return, and allow it.

Cafe of the Parifh of Saint Peter and Paul in Marlborough.

Juftices may order one parifh to pay a fum in grofs to another, but then they muft make the rate by which it is to be raifed.

2 Seff. Ca. p. 324. No. 186. S. C.

TWO juftices reciting the inability of the parifh of *Saint Mary the Virgin* to maintain its own poor, order the church-wardens and overfeers of *Saint Peter and Paul* to affefs, raife and levy 60*l.* for the maintenance of the poor of the other parifh. And objection being made to their ordering fuch a grofs fum, the court held it well in that refpect, according to 1 *Vent.* 350. *Salk.* 480. *Cumb.* 309. (1). But then the order was quafhed, becaufe the juftices had delegated their power of affeffing and rating the parifhioners to the churchwardens and overfeers; whereas by the 43 *Eliz.* *c.* 2. the juftices are to make the rate on all, or particular perfons.

(1) *Rex* v. *Holbeche*, 4 *Term Rep.* 778. *Nol. Rep.* 121. *Ref.* acc.

Olive *verſ* Ingram.

IN *aſſumpſit* for money had and received to the plaintiff's uſe, a caſe was made at *niſi prius* for the opinion of the court.

A woman is capable of being a ſexton and of voting in the election.
13 Vin. Abr. 159. pl. 7.

That there being a vacancy in the office of ſexton of the pariſh of *Saint Botolph without Alderſgate*, in the city of *London*, the plaintiff and *Sarah Bly* were candidates: that *Bly* had 169 indiſputable votes, and forty which were given by women who were houſe-keepers, and paid to church and poor; that the plaintiff had 174 indiſputable votes, and 22 other votes given by ſuch women as aforeſaid; that *Bly* was declared duly elected: upon which the plaintiff brought a *mandamus* and was ſworn in, and the defendant had received 5 *s.* belonging to the office.

In this caſe two points were made: 1. Whether a woman was capable of being choſen ſexton. And, 2. Whether women could vote in the election.

[1115]

As to the firſt, the court ſeemed to have no difficulty about it, nor did I think proper to argue it, there having been many caſes where offices of greater conſequence have been held by women, and there being many women ſextons now in *London*: the authorities cited upon this point were *Spelman's Gloſſ.* 497. * *Mich.* 2 *Ann.* a woman appointed governor of *Chelmsford* work-houſe: Lady *Broughton*'s caſe, who was keeper of the *Gatehouſe*. 3 *Keb.* 32. *Blunt's Tenures* 47. 4 *Inſt.* 221. 215. *Dy.* 285. *Hob.* 148. And in *Brady's Hiſtory of Boroughs*, it appears that my Lady *Packington* was the returning officer for members at *Ayleſbury*.

* 2 L. Raym. 1014. Vide 2 Term Rep. 595.

As to the ſecond point 4 *Inſt.* 5. was cited to ſhew women could not vote for members of Parliament or coroners, and yet they have freeholds and contribute to all publick charges, and even to the wages of knights of the ſhire, which by the *Regiſter* 192. *a.* are to be levied *de communitate comitatus.* And though they vote in the monied companies, yet that is by virtue of the acts which give the right to all perſons poſſeſſed of ſo much ſtock: that military tenures never deſcended to them. *Wright's Tenures* 28. *Weſt's Inquiry into the manner of creating Peers* 44.

But the court notwithſtanding held, that this being an office that did not concern the publick, or the care and inſpection of the morals of the pariſhioners; there was no reaſon to exclude women, who paid rates, from the privilege of voting: they obſerved, here was no uſage of excluding them ſtated, which per-

 haps

haps might have altered the cafe: and that as this cafe was ftated, the plaintiff did not appear to have been duly elected; and therefore there ought to be judgment againft him.

Dominus Rex *verf.* Inhabitantes de Eaft-Bridgford.

Apprentice's fettlement. Burr Sett. Ca. 133. and Seff. Ed. 1752. vol. 2. p. 215. No. 151. S. C. Ante 10. 1001. Vide alfo *Caifter v. Eccles*, L. Raym. 683. Salk. 68.

UPON a fpecial order it was ftated that an apprentice upon the death of his mafter, was with his own confent turned over by the widow (who had taken no adminiftration) to another mafter, whom he ferved. And the court held it a good fettlement in the laft parifh, within the reafon of the cafe of *Holy Trinity* and *Shoreditch*, *Mich.* 3 *Geo.* 1. where *A.* was bound to *B.* but ferved *C.* all the while in another parifh, and there gained a fettlement.

[1116]

Between the Parifhes of Saint Neots *and* Saint Cleer.

A fettlement is gained by living on his own eftate, and remains after the eftate is fold. Burr. Sett. Ca. 132. and Seff. Ca. Ed. 1750. vol. 1. p. 400. No. 318. S. C.

UPON appeal from an order of removal from *Saint Neots* to *Saint Cleer*, the cafe was ftated, that the *pauper* was born in *Saint Cleer*; that he lived a year as a hired fervant at *Saint Neots*, and then returned to *Saint Cleer*, and lived with his mother on a tenement, in part whereof he had an eftate of inheritance, of which he was feifed in common with his mother and fifters; that he afterwards fold his right; and that he had never lived upon it forty days together. And it was infifted on, that though whilft he had the eftate he was not removable; yet it was but a temporary fettlement. And the fettlement gained at *Saint Neots* by fervice would revive. But the court held, that he had gained a fubfequent fettlement at *Saint Cleer* by living forty days upon that eftate, and the felling it afterwards made no alteration.

Sir Alexander Anftruther's Cafe.

After one county feffions has determined an infolvent debtor's cafe; he cannot remove and hear his cafe in another county.

HE being a prifoner for debt in the *King's Bench* prifon in *Southwark*, applied to the quarter feffions for *Surrey* to be difcharged upon the infolvent debtors act; but being oppofed by a 500*l.* creditor, he was ordered to continue in cuftody, and the creditor to pay him one penny *per* week; and at a fubfequent feffions it was refufed to increafe the allowance.

Upon this he removed by *habeas corpus* to the *Fleet*, and applied to the feffions in *London*; where he was allowed to the extent of the act, 3*s.* 6*d. per* week. And for non-payment thereof

of he was at a fubfequent feffions abfolutely difcharged. And all thefe orders being removed by *certiorari*, the court was of opinion, that the *London* orders ought to be quafhed: for he was the proper fubject of the *Surrey* jurifdiction at the time of making their orders. And it is like the cafe of a fecond removal of a *pauper*, where it appears there is a former order in force, and no variation of the circumftances and merits of the cafe: befides, if all the orders ftand, the creditor is made to pay more than the Parliament has appointed by one penny. Wherefore the *London* orders were quafhed.

Heath *verf.* Walker. In Middlefex. [1117]

UPON looking into the record there was no iffue joined, for it was *et præd'* the defendant, inftead of the plaintiff, *fimiliter* (1): it was therefore objected, that the Chief Juftice had no commiffion to try any iffue. And the doubt was, what to do, for the jury had been fworn. And upon advifing with the bar, the Chief Juftice difmiffed the jury, for he could not call the plaintiff, or fuffer the defendant to take a verdict.

If it appears no iffue is joined, the jury muft be difmiffed.

Ante 267.

(1) That this would have been amendable after verdict. *Vide Rawbone* v. *Hickman*, *ante* 551. and the note. See alfo *Cooper* v. *Spencer*, *ante* 641. and *Sayer* v. *Peacock*, *Cowp.* 407.

Michaelmas Term

13 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
Sir William Chapple, *Knt.*

Dudley Ryder, *Esq*; *Attorney General.*
John Strange, *Esq*; *Solicitor General.*

Dominus Rex *verf.* Bettefworth.

Though the wife has a feparate eftate at her difpofal, and makes a will; yet if there be no affent of the hufband, he fhall have adminiftration. Ante 891. 1111.

TO a *mandamus* to grant adminiftration to the hufband, it was returned, that the wife's mother having by her will given her feveral effects for her feparate ufe exclufive of the hufband, and to be by her difpofed of as fhe fhould think fit, fhe had accordingly made a will, whereby fhe devifed her feparate eftate to truftees, with whom the hufband was now litigating the validity thereof in the ecclefiaftical court, pending which fuit the dean of the Arches could not grant adminiftration. *Et per curiam*, This is an infufficient return, for here is no act of the hufband's to exprefs his affent to her making a will; and fhe may have *chofes* in action, or other rights, befides what are included in her mother's will: in thefe cafes there muft be fome act done by the hufband, to exclude himfelf; which not being pretended in this cafe, there muft be a peremptory *mandamus*.

Green *verf.* Giffard.

THE caufe was tried upon a day to which it was continued by a fecond countermand. And the defendant making no defence, the verdict was fet afide, it being only in the plaintiff's power to continue his notice once in a term. And *Page* J. faid, it was fo fettled in C. J. *Holt*'s time on examining the attornies (1). Practice. Vide Impey's Prac. K. B. 315.

(1) In *Boyes* v. *Twift*, *Barnes* 292. acc. *in C. B.*

Dominus Rex *verf.* Calcutt et Monk.

THERE were five feveral convictions for deer-ftealing returned, four of which being either for killing, or aiding in killing deer, in *Waltham* foreft, had no objections made to them that are worth taking notice of; but as to the fifth, which was for deer-ftealing in a *purlieu* of the foreft, it was objected, Deer-ftealers. Vide 16 Geo. 3. c. 30.

That it was not averred, that deer were ufually kept in the *purlieu*, but only that they were ufually kept in the foreft, whereas by 3 *W.* & *M.* *c.* 10. that feems to be required. The claufe is, "If any perfon fhall unlawfully courfe, &c. any red "or fallow deer in any foreft, chafe, *purlieu*, paddock, wood, "park, *or other ground inclofed, where deer have or fhall be ufually* "*kept*, without the confent of the owner, or perfon chiefly in-"trufted with the cuftody thereof, or fhall be aiding or affifting "therein, and fhall be convicted thereof, he fhall forfeit, &c." To this it was anfwered by Mr. Solicitor General, That fuch averment could not extend to a *purlieu*, for 4 *Inft.* 303. defcribes it as a place where by law deer cannot be kept, it being difaf-forefted as well with regard to all others as the owner, and the oath of the ranger, 304. is to drive deer out of the *purlieu* into the foreft. *Manwood* 292. Secondly, The averment as to fo-refts, chafes, and *purlieus*, is not made neceffary by the act, for the words *where deer are ufually kept* extend only to ground in-clofed; elfe the words *other ground* will make it neceffary to aver that the foreft, &c. was inclofed, which is not the cafe in any part of *England*. 3 W. & M. c. 10. Trem. Ent. 329. No fuch averment as to a park.

Et per curiam, The anfwer is right in both refpects.

Another objection was, that it did not appear, but that the defendant was owner of the *purlieu*; in which cafe he had a right to chafe the deer off his ground. *Sed per curiam*, That would be matter of defence, and fhould be fhewn on his part, according to the refolution in the cafe of the *King* v. *Bryan*, (*ante* 1101.) fo the convictions were confirmed.

Hickman *verf.* Colley.

What cofts are to be paid when the defendant makes a fuggestion for cofts. Andr. 377. S. C.

BY 3 *Jac.* 1. *c.* 15. it is provided, That if one citizen of *London* fue another out of the jurifdiction, and does not recover 40 *s.* he fhall not only lofe his own cofts, but fhall alfo pay to the defendant fo much ordinary cofts, as fuch defendant fhall juftly prove it hath coft him in defence of the fuit.

Ante 46. 974.

In this cafe the verdict was for lefs than 40 *s.* and the court gave the defendant leave to fuggeft it on the record, as the only way to get at his cofts (1). And a fuggeftion being made, and a demurrer put in to it, which was adjudg'd for the defendant; it came to be a queftion, whether the cofts of the application fhould be allowed, or only cofts of the trial and former proceedings, this not being ftrictly fpeaking cofts of the defence. But the court ordered the cofts of the whole to be taxed.

(1) *Vide Wilfon* v. *Donnelly*, *Say. Rep.* 273. *Fitzpatrick* v. *Pickering*, 2. *Wilf.* 68. *Waje* v. *Wyburd*, *Dougl.* 246. and the cafes there cited. S. P. where the action was brought againft an inhabitant of *Middlefex*. But if the defendant lives within the jurifdiction of the *Weftminfter* courts, he muft plead 23 *Geo.* 2. *c.* 27. in bar. *Taylor* v. *Blair*, 3 *Term Rep.* 452.

Doe on the Demife of the Dutchefs of Hamilton *verfus* Robinfon et al'.

When to plead to the jurifdiction in ejectment.

DECLARATIONS in ejectment were delivered before the effoin day of *Eafter* term, and in *Trinity* term the defendants appeared, and moved for leave to plead to the jurifdiction, that the lands lay in the county palatine of *Chefter*. And upon fhewing caufe, I objected that they came too late. *Sed per curiam*, Though in ordinary cafes the defendant muft plead this within the firft four days; yet we all know that in a country caufe the tenants cannot be compelled to appear till four days after *Trinity* term. As therefore they have come in voluntarily before they could be obliged, it is hard to fay they are out of time. And the rule for pleading to the jurifdiction was made abfolute.

Dominus Rex *verf.* Crofts.

CONVICTION on 9 *G.* 2. *c.* 23. for felling gin. It was objected by Serjeant *Bootle*, that it appeared the defendant was a *feme covert*, and therefore as fhe could make no contract, it muft be taken to be her hufband's fale; or if fhe could be convicted, he ought to have been joined for conformity. And 2 *Keb.* 468, 479, 634. 1 *Sid.* 410. were cited. A feme covert may be convicted for felling gin. 1 Hawk. P. C. ch. 1. fect. 12, 13. p. 4.

Mr. Solicitor *contra* faid, that where the crime is of fuch a nature, as can be committed by her alone, fhe may be indicted without her hufband; which being a proceeding grounded merely on the breach of the law, he fhall not be included unlefs privy. *H. P. C.* 65. 1 *Hawk.* 3, 147. 6 *Mod.* 213, 239. In this cafe there may be imprifonment and whipping. [1121] Poft. 1122.

Et per curiam, We think the conviction is right; for this is not like the cafes that found only in damages: the wife may be convicted alone for recufancy. *Hob.* 96. 11 *Co. Forfter's* cafe. And though fhe cannot have the benefit of the contract, yet fhe as well as a fervant may do the act of vending. *Salk.* 384. *Cro. Jac.* 482. Befides there would be a plain way to evade the act, if *feme coverts* could not be convicted (1).

(1) "*Ellen Taylor's cafe*, "*Pafch.* 5 *Geo.* 3. *B. R. a married* "*woman was committed to the houfe* "*of correction for not performing* "*an order, for maintenance of a* "*baftard child had before marriage.* "*The commitment on return to an* "*habeas corpus was held good.*" MSS. S. C. 3 *Burr.* 1679.

Gainfborough, Executor of Gainfborough, *verf.* Follyard.

THE defendant was indebted by bond to the teftator of the plaintiff, who died 13 *March* 1738. Upon making up all accounts the defendant on 3d *April* 1739. executed a warrant of attorney to confefs judgment at the fuit of the executor as of laft *Hilary* term, or any fubfequent term, and 7 *April* the judgment was entered up, and the defendant's goods taken in execution. After this a commiffion of bankruptcy iffued againft him. And now the affignees moved to fet afide the judgment, as being entered of *Hilary* term, when the teftator was living. And the court held it to be irregular, for the attorney could have no authority to appear in *Hilary* term at the fuit of the executor: and the judgment muft be confidered as of that term, though to other purpofes the day of figning is material. So the judgment and execution were fet afide. Judgment at the fuit of executor fet afide becaufe by relation it was in teftator's life-time. 14 Vin. Abr. 617. pl. 8. S. C.

Brittain *verf.* Greenville.

THE defendant in ejectment obtained a trial at bar, on confenting to pay bar cofts, and receive *nifi prius* cofts. After this the leffor was admitted *in forma pauperis*, and had a verdict Pauper. 16 Vin. Abr. 262. pl. 15. S. C.

1 Phil 125.

verdict against him. And now having brought a new ejectment, it was moved that the master might tax costs, in order to ground a further motion to stay his proceedings in the second ejectment. But the court refused to make any rule, saying every man had a right to a second trial before ejectments were introduced, and might bring a writ of right after a verdict in assise. And they could not construe the rule as a consent on his part to pay costs in all events, but only as terms put upon the defendant. That the regular way when a *pauper* is vexatious, was to dispauper him (1); but they could not think he was so in the present case.

[1122]

(1) *Taylor* v. *Lowe*, *ante* 983. acc. and see *Noaks* v. *Watts*, *ante* 420.

Dominus Rex *verf.* Watkinson.

At Nisi prius *in* Middlesex.

Attorney present at putting in an answer cannot be obliged to swear.

UPON an indictment for perjury in an answer in Chancery, the master who took it was called, but could not speak to the identity of the person. Upon which the prosecutor insisted to examine the defendant's solicitor, who was present at putting in the answer, and had been subpoenaed; but he insisting on his privilege, the Chief Justice would not compel him to be sworn: so the defendant was acquitted. *Quære tamen*, for this was to a fact in his own knowledge, and no matter of secrecy committed to him by his client (1).

(1) *Vide* the opinion of Lord *Mansfield* in *Doe* v. *Andrews*, *Cowp.* 846. *Lord Say and Seale's* case, *Bull. N. P.* 284. *Cobden* v. *Kenrick*, 4 *Term Rep.* 432. agreeing with the reporter's objection, and that proof of the master's hand-writing, together with that of the defendant subscribed to the answer, is *prima facie* sufficient evidence of his identity. *Vid. Rex* v. *J. Morris*, 2 *Burr.* 1189.

Fowles *verf.* Sir John Dinely. At Nisi Prius in Middlesex.

Where the husband shall not be charged for necessaries for the wife. Gilb. L. E. 183.

THE defendant's wife having been convicted of a conspiracy to charge her husband with subornation of perjury, was committed in execution for a year. The plaintiff kept a spunging-house, within the rules, and received the defendant's wife in to his house, and found her necessaries, for which this action was brought. The Chief Justice ruled, that it would not

not lie; for her being there was illegal, ſhe being ſuch a priſoner as was not intitled to the benefit of the rules (1), and in ſuch caſe the law will not raiſe an implied promiſe, to charge the huſband (2).

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(1) Caſe of *Landen Jones, ante* 817.

(2) *Vide Bolton* v. *Prentice, poſt.* 1214.

Jordan *verſ.* Lewis. At Guildhall.

THE plaintiff and another were indicted at the *Old Bailey* for forgery, and acquitted, and a copy of the indictment granted to the other only. In this action, which was for a malicious proſecution, the plaintiff offered the copy in evidence; and the order at the *Old Bailey* was read by way of objection. But the Chief Juſtice ſaid, he could not refuſe to let the plaintiff read it, for an order was not neceſſary to make it evidence, nor is it ever produced in order to introduce it. So it was read, and a verdict obtained for the plaintiff, which the court refuſed to ſet aſide. Evidence.

Hilary Term

13 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
Sir William Chapple, *Knt.*

Dudley Ryder, *Esq*; *Attorney General.*
John Strange, *Esq*; *Solicitor General.*

Dominus Rex *verf.* Sparrow et al',

Overfeers may be appointed at any time in the year.
2 Seff. Ca. p. 184. No. 140.
2 Bott by Conft 17. pl. 33.
3 Burn's Juft. 320. S. C.

A *Mandamus* iffued *tefte* 1 *June*, directed to the juftices of *Ipfwich*, to appoint overfeers of the poor: to which they returned, that they had in obedience to fuch writ made an appointment: and that being removed by *certiorari*, appeared to bear date 13 *June*.

It was objected by Mr. Solicitor General, in order to quafh the *mandamus* and appointment, that it appeared the month after *Eafter* (which is a time given by the ftatute to make the appointment in) was expired before the writ iffued, *Eafter* day being 22 *April*: and the court was bound to take notice of that according to *Salk*. 626. and *Hoyle* v. *Lord Cornwallis*, *Trin.* 6 *Geo.* 1. *ante* 387. The act defigned the juftices fhould do it within a limited time, and therefore puts it in *Eafter* week, or within one month after *Eafter*: now if it may be done at any time, it will introduce great confufion, and it will be many years before it comes round to the right time again. There can be no inconvenience in this, becaufe the churchwardens are overfeers, and take care of the poor, and there is a penalty upon the juftices,

tices, which goes to their use. This is a part of the act, which was never yet thought to be directory only.

The court upon the argument (except *Page* J.) inclined to think the *mandamus* and appointment were wrong: but upon further consideration, they all held the appointment good, and confirmed that, and allowed the return, the Chief Justice delivering the following resolution:

The court must judicially take notice, that this is made without the month: but then the question is, whether it is void or not? The adding a penalty is an argument it is not so, for it was foreseen there would be inconveniencies if it was not done in time, and it might therefore be proper to enforce a speedy execution of the power: and this was the construction as to taking pledges on *Westm.* 2. *c.* 2. 2 *Roll. Abr.* 259. Though it is a new law, yet against the justice and meaning of it no negative shall be implied. *Magna Charta* says, *Communia placita non sequantur curiam nostram*; and yet if the Common Pleas gives judgment to abate the plaintiff's writ, which is reversed in the King's bench, that court shall proceed upon the writ. 2 *Inst.* 23. So also as to an assise in the proper county. 2 *Inst.* 25. The statute 2 *E.* 6. *c.* 4. requires two or more justices; and yet 3 *Inst.* 136. it is held, that where there is but one justice, he may execute the authority.

Ante 387.

The 43 *Eliz.* *c.* 2. being for the maintenance of the poor, must be construed liberally, and so said *Pratt* C. J. *Trin.* 7 *Geo.* 1. in the case of *Rufford*, where a *mandamus* to appoint overseers in an extraparochial place was granted after the month was expired; and so it was *Trin.* 5 *Geo.* 2. in the case of *Uttoxeter*: and though these were cases on 13 & 14 *Car.* 2. *c.* 12. yet they must derive their authority from the former law. Here are no negative words; as in 12 *Car.* 2. *c.* 25. § 13. as to the price of wines, where the words *and at no other time* are added.

Ante 512.

Ante 932.

It is considerable, that this is a thing which it is not in the power of the parish to procure, and is therefore a construction *ex necessitate* (1).

(1) *Rex* v. *Stubbs*, 2 *Term Rep.* 395. S. P.

Haswell qui tam *vers.* Chalie.

An Importer of wine in pipes and hogsheads sells to three persons at several times a dozen of quart bottles thereof unmeasured, which were carried away by them and drank in their own houses, that is a selling by retail within 12 Car. 2. c. 25. and 15 Car. 2. c. 14. Andrews 392. more full. It was also argued that this was an offence within 7 E. 6. c. 5. s. 8. Andr. 393. The verdict must find that the quantity sold is retail measure.

IN debt on 12 *Car.* 2. *c.* 25. for selling wine by retail without licence, the jury found a special verdict to this effect; and the defendant was a merchant who imported wine in pipes and

hogsheads, swearing it did not belong either to vintner or retailer; that he sold to three different persons at three different
[1125] times one dozen of quart bottles of *Oporto* wine unmeasured by any measure, refusing to sell by the gallon; and that this wine was drawn out of a pipe by him imported, and was carried away by the buyers, and drank in their private families, and not elsewhere; and that the defendant had no licence. And after two arguments, the court was unanimously of opinion, that this was retailing within the meaning of the statutes 12 *Car.* 2. *c.* 25. and 15 *Car.* 2. *c.* 14. *Minshul's Dictionary, verbo Retail.* So judgment was given for the plaintiff.

5 *March* 1740, this judgment was reversed in the House of Lords, the dozen of quart bottles not being found to be a retail measure (1) and a *venire facias de novo* awarded (2).

(1) "*In an opinion given by* Mr. "*Henley afterwards Lord Chancellor* "*in* 1743, *speaking of this case he* "*says he could not help suspecting* "*there were some other reasons for* "*that judgment than those appearing on the face of the proceedings,* "*and I have been informed that no* "*objection was made in Westminster* "*Hall to the verdicts being imperfect and that the judgment of the* "*House of Lords seemed to be formed* "*upon the unseasonableness of determining the point.*" *MSS.*

(2) *Kynaston* v. *Mayor of Shrewsbury*, *ante* 1053. and the note.

Coulson *vers.* Coulson.

What words pass an estate-tail. 2 Atk. 246, 247. 2 Eq. Ab. 318. c. 34. S. C.

A Case was sent from the *Rolls*, wherein the question was, whether an estate-tail, or only an estate for life, passed by a will: and it was this.

Robert Bromley devises to his grandson *Robert Coulson* and his assigns for his life natural, the reversion of lands expectant on death of the devisor's sister, and from and after the determination of the estate for life of his said grandson, then to trustees during the life of his grandson to preserve contingent remainders, and from and after the death of his grandson, unto the heirs of his body lawfully begotten and to be begotten, with divers remainders over.

And upon the first argument the court was clear in opinion, that this was an estate-tail in the grandson (1). The cases cited,

(1) The certificate of the court was, "that by reason of the remainder interposing between the devise to *Robert* for life, and the subsequent limitation to the heirs of his body, the said *Robert* took an estate for life, not merged by the devise to the heirs of his body, but by that devise an estate tail in remainder vested in the said *Robert*." 2 *Atk.* 250. *Vide Fearne* *C. R.* 4th ed. 338.

"*So the case as above reported by Strange is not law, and materially differs in this respect that the wife of Robert would not have been dowable.* *MSS.*

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to prove it an eftate-tail were 1 *Co. Shelley*'s cafe (2). *Co. Litt.* 22 *b.* 319. *b.* *Cro. Eliz.* 525. 1 *Vent.* 214. *Trin.* 11 *Ann.* *rot.* 220. *Backhoufe* v. *Wells*, *Abr. Ca. Eq.* 184. *Mich.* 13 *Geo.* 1. *Goodright* v. *Pullen*, *ante* 729. And a cafe at the Council Board of *Wood* v. *Morris* (*a*).

(*a*) Cited 2 Burr. 1102. 2 Atk. 249. Fearne C. Rem. 4 ed. 247.

E contra were cited *Carter* 170. 1 *Sid.* 81. *Salk.* 568. 224. 3 *Lev.* 437. *Carth.* 72. *Abr. Eq. Caf.* 105. 390. 1 *Vent.* 231 (3).

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(2) The rule in *Shelley*'s cafe, here cited, is laid down in thefe terms, 1 *Rep.* 104. *a.* "where the anceftor by copy, gift, or conveyance, takes an eftate of freehold, and in the fame gift or conveyance an eftate is limited either mediately or immediately to his *heirs* in fee or in tail, that always in fuch cafes (the *heirs*) are words of limitation of the eftate, and not words of purchafe."

(3) Lord *Hardwicke* is ftated not to have been fatisfied with the opinion expreffed in this certificate, *per* Lord *Mansfield* in *Doe* v. *Laming*, 2 *Burr.* 1109. and in *Hodgfon* v. *Ambrofe*, *Doug.* 326. In this laft cafe however the judges of *B. R.* certified, "that whatever their opinions might have been if the cafe were new, they thought that as the cafe of *Coulfon* v. *Coulfon* was literally the fame, the precife queftion ought not to be agitated again." But Mr. Juftice *Buller* defended the prefent certificate, upon the ground that the teftator having made ufe of legal phrafes *only*, the court were bound to underftand them in a legal fenfe.

In *Bagfhaw* v. *Spencer*, 1 *Vez.* 142. 3 *Atk.* 246. 570. 577. where *A.* devifed lands to five truftees, their heirs, &c. *in truft* by rents, *fale*, or *mortgage*, to pay debts, &c. and after payment thereof to three of the truftees and their executors for 500 years, to pay legacies and a life annuity, and after the determination of that eftate, he devifed the premiffes to all the truftees, in truft to the ufe of *T.* his nephew, for life", &c. (with the fame limitations as in the fubfequent devife to *B.* upon whofe intereft the queftion arofe) "and for want of fuch iffue, to the ufe of his nephew *B.* *for the term of his natural life*, without impeachment of wafte, and after the determination of that eftate, to the fame truftees during the life of *B.* to preferve contingent remainders, and after his deceafe, *then to the ufe of the heirs of the body of B.*" with like remainders over. Lord *Hardwicke* was of opinion that *B.* took only an equitable eftate for life, and diftinguifhed that cafe from the prefent, as being the devife of a truft in equity, whereas this was of a mere legal eftate. But the authority of this decifion, except perhaps for a devife literally the fame, has been confiderably fhaken by *Garth* v. *Baldwin*, 2 *Vef.* 646. *Wright* v. *Pearfon*, *Fearne C. R.* 4th ed. 187. *Amb.* 358. S. C. and *Jones* v. *Morgan*, 1 *Bro. Chan. Caf.* 206. This diftinction between the conftruction of a limitation of a legal eftate, and that of a truft executed is alfo held to be of no validity in *Auftin* v. *Taylor*, *Amb.* 376. *Doe* v. *Laming*, 2 *Burr.* 1108. and *per* *Buller*

Buller J. in *Hodgson* v. *Ambrose*, *Doug*. 329. The cases which resemble the present one most by reason of the existence of a devise to trustees to support contingent remainders, are beside those already cited, *Papillon* v. *Voice*, 2 *P. Wms*. 471. *Sayer* v. *Masterman*, *Fearne C.R.* 4th ed 249. *Amb*. 344. S.C. *Perrin* v. *Blake*, 4 *Burr*. 2579. 1 *Black. Rep*. 672. *Fearne C. R.* 4th ed. 239. S. C. *Thong* v. *Bedford*, 1 *Bro. Chan. Ca*. 317. In some of these cases, the devisees took a legal, and in others an equitable estate, but the invalidity of this distinction we have seen already. In others a distinction has been taken between such trusts as are deemed executed, and such as are considered as executory. Where devises have been adjudged of the latter kind, as in *White* v. *White*, *Amb*. 670. Courts of equity have inclined as in the case of marriage articles, to consider a subsequent limitation to "heirs of the body," as giving an estate to such heir by *purchase*. Lord *Glenorchy* v. *Bosville*, *Cas. temp. Talb*. 3. *Roberts* v. *Dixwell*, 1 *Atk*. 601. *Baskerville* v. *Baskerville*, 2 *Atk*. 281. *Dobson* v. *Hay*, 3 *Bro. Chan. Ca*. 404. *Bastard* v. *Proby*, 2 *P. Wms*. *Cox*'s edition 478. note. The solidity of this distinction however has been questioned by Lord *Mansfield* in *Doe* v. *Laming*, 2 *Burr*. 1108. and by Lord *Hardwicke* in *Bagshaw* v. *Spencer*, 1 *Vez*. 152. But in *Bastard* v. *Proby*, cited *supra*, Lord *Kenyon* C. J. then Master of the Rolls, is represented to have said, (upon the authority of Lord *Northington*, in *Loyd* v. *Jones*,) that Lord *Hardwicke* did *at last* admit a difference between them. The application of the rule in *Shelley*'s case is most ably treated of in *Harg. Law of Tracts* 551. Mr. *Butler*'s note 1 *Harg*. and *Butl. Co. Litt*. 376. *b*. and in the late and justly to be lamented Mr. *Fearne*'s profound and perspicuous treatise on *Contingent Remainders*, 4 ed. p. 103 to 319. The result of these gentlemens' opinions, which are sanctioned by the authority of Lord C. *Thurlow*, in *Jones* v. *Morgan et supra*, seems to be, that where the intention of the testator is manifestly clear to give an estate for life to the first taker, and that the second should take by *purchase*, such intention must prevail notwithstanding the devisor has described the person who is to take after the devisee for life, by the words "*heirs of his body*," &c. But wherever it is evident that the testator intended that the whole line of heirs to the first taker, who answer to the description in his will, should succeed to him *as such*, there the first taker cannot have an estate for life, but must take one either in tail or in fee, "because all heirs claiming as heirs must take by *descent*, which is the same thing as saying that the ancestor who is the *stirps* or *terminus*, must have the inheritance. If therefore an estate to the ancestor for *life*, and to *his heirs* as *heirs* by *purchase*, is inconsistent with the rules of law, it can no more be devised by a will than a fee simple in the same lands to *A*. every *Monday*, and *B*. every *Tuesday*, or a fee be limited upon a fee. Taking it for granted then that the intention to include the whole line of heirs, (whether general or special) to the tenant for life in the devise is manifest, any clause in the will giving the first taker a lesser estate than one of inheritance, or willing that the estate given to him should have the properties of an estate for life only, must be rejected as repugnant to the chief object in the mind of the testator.

The seeds of this criterion by which the application of the rule to wills is to be determined, may perhaps be traced to the difference taken in many of the cases as to whether the word "heir," or the word "issue," is used by the testator as *nomen collectivum*, or merely as a *designatio personæ*. *Vide Clarke* v. *Day*, *Cro. Eliz.* 313. *King* v. *Melling*, 1 *Vent.* 232. *Luddington* v. *Kime*, 1 *Ld. Raym.* 205. *Backhouse* v. *Wells*, 1 *Eq. Abr.* 184. *Shaw* v. *Weigh*, *ante* 804. The reason for the original introduction of this rule is stated by Lord *Mansfield* in *Doe* v. *Laming*, 2 *Burr.* 1106. to be in favour of the lord to prevent his being deprived of the fruits of the tenure, and for the sake of specialty creditors; and his lordship adds, that the reason of the maxim having ceased with the abolition of tenures, that although from having become a rule of property, it is adhered to in all cases literally within it, yet where there are circumstances which take the case out of the letter of the rule, it is departed from in favour of the intention. The various cases cited *supra*, in which the application of this rule has been discussed, subsequent to *Doe* v. *Laming*, shew that the judges have not concurred in his lordship's opinion to its full extent. Whatever attempts have been made to reconcile and render consistent the application of the rule with the intention of the testator, it can scarcely be denied that such intention is in general violated by its adoption, even where the devisor does not add words of restriction to his express donation of an estate for life. We cannot help therefore looking upon this as an anomalous class of cases, being the only one in which the form of expression does not yield to the intention of the testator to limit his estate in a manner in other respects consistent with the rules of law. Unlettered men, knowing that they can give an estate for life to the ancestor, and one of inheritance by purchase to all his issue in successive remainders, are unacquainted with those formal distinctions used in transmitting property which in truth are now nothing more than differences of expression. The reasons for creating them in conveyances originally founded in the interests of society, having ceased, they are now only known to those who have traced our law through the various modes it has been forced to have recourse to, in order to accommodate itself to the acts of the legislature, and the alteration of human events. To the rest of mankind it must remain unaccountable, and therefore be often unattended to, that a manifest design to give an estate for life to the first taker, will be frustrated by the use of the word *heirs*, &c. in the subsequent limitation of the property to his children, while it would have taken effect by the use of the words "first and every other son, &c." But as it is clearly held that the intention of the testator is the fundamental principle in the construction of testamentary dispositions to which every *other* form of expression must and does yield, and to support which, words are often supplied or rejected, it will not I hope be thought too bold an assertion to make, That if this rule of construction had not been transferred from deeds to wills before the reason for its original adoption had entirely ceased, courts of judicature would not now apply it thus to interpret the dispositions of the unlearned part of mankind, in a manner which the numberless litigations upon the point prove to be repugnant to their sense. If judges were unset-

unfettered by numerous prior determinations, they might perhaps deem it a slighter violation of the words of a will, and a stricter compliance with the intention of the testator, *where other circumstances do not concur to vary the construction*, to give the devise for life its full effect, and to construe the word "heirs" in all cases as they have done, in that of a devise of an executory trust, and as they do the word "issue." That is to consider it as tantamount to a first and *every other son and their heirs*, and so on according to the various words of limitation that may be superadded in the devise. Lord *Hardwicke* and Lord *Mansfield* seem to have proceeded on reasons something like these when they disapproved of the decision in the present case, and attempted to lay the rule aside in *Bagshaw* v. *Spencer*, and *Perrin* v. *Blake*, where the technical modifications of the devise gave them an apparent latitude to depart from established judgments. But opinions which these great men have found themselves unable to shake by the strength of their reasoning and reverence to their authority, must now be considered as unalterably fixed, we may therefore conclude that the law is finally settled, and refer to those two discriminating lines pointed out by Mr. *Fearne*, which, when they concur, the rule *must*, and when they do not, the rule cannot apply. "The one is, that the person to claim the inheritance *after the ancestor* is to claim as *heir*, &c. that is, *eo nomine*, and under *that description*, whoever such person may be; and the other, that the effect of the limitation is not confined to the person so *first* claiming, or his representatives *as such* of any description; but directed equally through *all other persons* successively answering the same relative description of *heirship* general or special to the *ancestor* referred to, and entitling them *eo nomine*, or in that character only."

[1126]

The Case of Henry Waldron, a Clerk in the Crown-Office.

Clerk of the crown-office may have a rule for the original client to pay him.

INGRAM an attorney (since deceased) employed him in several *quo warranto* causes in the borough of *Evesham*, which were prosecuted and defended by Sir *John Rushout* and Mr. *Rudge*, who were *Ingram*'s clients, and bills were delivered by *Ingram* to them, in which were included the clerk in court's demand amounting to 292 *l.* 6 *s.* since which *Ingram* is dead insolvent, and his executors insist to receive the whole of Sir *John Rushout* and Mr. *Rudge*, and leave the clerk in court to come in as a creditor. Upon this I moved, that Sir *John Rushout* and Mr. *Rudge* (who admitted to have above 600 *l.* in their hands of *Ingram*'s bill) might pay the clerk in court his share, as is done every day in Chancery; and the gentlemen submitted to do as the court should direct. *Et per curiam*, There is no reason why we should not take the same care of our clerks: the money paid to *Waldron* will not be assets that have come to the hands of the executors, so they cannot be prejudiced. A rule was made for their paying to Mr. *Waldron* 292 *l.* 6 *s.* which was his proportion of the bill (1).

(1) *Rex* v. *Smollet*, 3 *Burr.* 1313. S. P.

Hooker *verf.* Wilks.

DEBT on 8 *Geo.* 1. *c.* 19. for the penalty of 30*l.* by ufing a hound to deftroy game. And after a verdict for the plaintiff, the judgment was arrefted, for 5 *Ann. c.* 14. has not the word *hound*, and the words *other engines* come after nets, *&c.* and are applicable only to inanimate things. And this being a penal law, cannot be extended. The ftatute 22 & 23 *Car.* 2. *c.* 25. has indeed general words, *or any other dogs to deftroy game*, but this is not a conviction on that ftatute (1).

8 Geo. 1. c. 19. *Hound* not within 5 Ann. c. 14. Cald. 177.

(1) *Vide Reafon* v. *Lifle*, *Com. Rep.* 576.

The Rector, &c. of Saint George Hanover Square *verf.* Steuart.

THE parifh was cited to appear in the Bifhop of *London's* court, to fhew caufe why a licence fhould not be granted to Mr. *Steuart*, to erect a charity-fchool on part of the church-yard. And upon motion of the rector and parifhioners a prohibition was granted, for the ecclefiaftical court has nothing to do with this, and cannot compel them without their confent.

Prohibition to a fuit for building charity-fchool in church-yard. 1 Burn's Eccl. L. 371.

Dominus Rex *verf.* Munoz. [1127]

HE was convicted for procuring from one *Mary Kingsford* by falfe tokens a promiffory note, under pretence that he would bring her money for it. And upon motion in arreft of judgment, it was held, that it is neceffary in an indictment, to fpecify the falfe tokens. 2 *Cro.* 20. 4 *Co.* 40. *H. P. C.* 265. 1 *Lev.* 299. So the judgment was arrefted (1).

The falfe tokens muft be fpecified in an indictment.

(1) 2 *Hawk. P. C. ch.* 25. *fect.* 57. 320. 4 *Com. Dig: Indictment*, (G. 3.) 394.

Case of the Level of Hull.

Sewers.

AN order of sewers was made for levying 9 *d.* *per* acre on 1312 acres, to be paid to the clerk, to be applied towards defraying of charges in and about the execution of the commission. And though it was objected, that this should have been on the occupiers, according to 10 *Co.* 143. *a.* yet the court held this good, for the words of the statute do not require it (1). Another objection was, that a rate cannot be made to reimburse charges, any more than to re-imburse overseers of the poor. *Sed per curiam,* In this case there is an express power to allow charges, whereas in that the 43 *Eliz.* *c.* 2. confines the power to rates *for relief of the poor*; and a rate after the poor have had it is not strictly so called. The order was confirmed.

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(1) *Vide Commissioners of Sewers* v. *Newburgh,* 3 *Keb.* 827. pl. 54. *Bew* v. *Smith,* 9 *Mod.* 94, 95.

Between the Parishes of Southwold *and* Yoxford in Suffolk.

Poor. Bur. Set. Ca. 140. S. C. 2 Sess. Ca. p. 371. no. 198. S. C.

UPON a special order of sessions it was stated, that the *pauper* took a house at *Southwold* at the rent of 10 *l.* *per annum,* the landlord agreeing to build a stable, washhouse, &c. to it. That the real value when taken was but 6 *l.* 10 *s.* *per annum,* and the landlord never made the new erections; but if they had been made, it would have been worth 10 *l.* *per annum.* And the court held this no settlement (1).

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(1) *Vide Rex* v. *Western, Burr.* S. C. 166.

Russell *vers.* Boheme. At Guildhall.

What is proof of buying goods beyond sea.

TO prove a property in the cargo on an action upon a policy of insurance, the plaintiff produced a bill of parcels of one *Gardiner* at *Petersburgh* with his receipt to it, and proved his hand. The defendant objected, that this was no evidence against the insurers; but the Chief Justice allowed it.

Easter Term

13 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
Sir William Chapple, *Knt.*

Dudley Ryder, *Esq; Attorney General.*
John Strange, *Esq; Solicitor General.*

Fitchet *vers.* Adams.

An entry by a stranger without authority is good to take advantage of a condition, if it be assented to afterwards.

IN ejectment on the demise of *Richard Hayes*, the jury found a special verdict to this effect: that *Richard Hayes* (since deceased) being seised in fee of the premisses in question, and having a wife *Margaret*, and a daughter *Elizabeth* of the age of six years, by his will dated 16th *May* 1722, devised to his wife and her heirs, but if she marries again, then he appoints two trustees to receive the rents, and apply them to the education of his daughter till she comes of age, and in case of such marriage of the mother he devises to the daughter in fee. That *Richard* died in *June* 1722, and the wife entered and married a second husband 15 *April* 1723, and the daughter continued to live with and was educated by her till her (the daughter's) death 5 *May* 1734, when she died without issue and unmarried; and the lessor of the plaintiff was her cousin and heir. That 22 *May* 1738, *John Wood* on behalf of the lessor of the plaintiff did, without any previous authority, make an actual entry on the premisses, claiming the same as the estate of the lessor in virtue

 of

of his heirship to *Elizabeth*, and that the lessor having notice thereof did 5 *June* 1738, assent thereto.

Upon this case two points were made: 1. Whether an actual entry was necessary. And, 2. If it was, whether this was a sufficient one.

[1129] The first of these depended on two questions, 1. Whether this devise over was a condition or a limitation; for if it was the latter, an actual entry undoubtedly was not necessary; 2. That if it was a condition, then whether it would be necessary; this not being to avoid a fine (1).

These were spoken to at the bar, but the court gave no opinion upon them; being very clear upon the second point, that what was found, did amount to an actual entry, to support an ejectment, being assented to before the day of the demise in the declaration. *Co. Litt.* 247. 258. 9 *Co.* 106. 1 *Roll. Abr.* 738. *pl.* 2, 3, 4. And they also held, that there was no occasion for its being by deed or in writing. Judgment was given for the plaintiff.

3 Com. Dig. Claim (b. 2.) 64.

(1) *Vide Berrington* v. *Parkhurst, ante* 1086.

Warren, ex demiss' Webb *vers.* Greenville.

A surrender of tenant for life shall be presumed on a recovery of forty years standing.

UPON a trial at bar, the lessor of the plaintiff claimed under an old intail in a family settlement, by which part of the estate appeared to be in jointure to a widow at the time her son suffered a common recovery, which was in 1699. And the defendants not being able to shew a surrender of the mother's estate for life, it was insisted that there was no tenant to the *precipe* for that part, and the remainder under which the lessor claimed was not barred.

To obviate this it was insisted by the defendant, that at this distance of time a surrender should be presumed; according to 1 *Vent.* 257 (*a*), and what is laid down in Mr. *Pigot's* book of *Common Recoveries* (*b*); and to fortify this presumption they offered to produce the debt book of Mr. *Edwards* an attorney at *Bristol* long since deceased, where he charges 32 *l.* for suffering the recovery, two articles of which are, for drawing a surrender of the mother 20 *s.* and for ingrossing two parts thereof 20 *s.* more, and that it appeared by the book the bill was paid.

(*a*) 3 Keb. 310. 1 Mod. 117. S.C.
(*b*) P. 41.

And

And this being objected to as improper evidence, the court was of opinion to allow it, for it was a circumstance material upon the inquiry into the reasonableness of presuming a surrender, and could not be suspected to be done for this purpose; that if *Edwards* was living he might undoubtedly be examined to it, and this was now the next best evidence. And it was accordingly read (1). After which the court declared, that without

An entry in an attorney's debt-book read after his death.

(1) Entries in private books or memorials are only admissible as evidence *to affect the rights of third persons*, upon proof that the writer is dead, and that they are in his hand-writing. *Dutchess of Marlborough* v. *Guidot*, cited 2 *Vez.* 193. In *Lefebure* v. *Worden*, *ib.* 55. with this restriction they seem ADMISSIBLE in four cases. *First*, Where the party charges himself by that entry with the receipt of money. *Smartle* v. *Williams*, cited by Lord *Hardwicke* in *Montgomerie* v. *Turner*, *Bull. L. N. P.* 283. *Comb.* 249. S. C. *Anon.* 1 *Ld. Raym.* 145. *Anon.* 12 *Vin. Abr.* 90. *pl.* 13. *Barry* v. *Bebbington*, 4 *Term Rep.* 514. *Stead* v. *Heaton*, *ib.* 669. *Searle* v. *Lord Barrymore*, *ante* 826. and according to this last case, an entry made by the person himself from whom the plaintiff derives his interest as his representative, *is admissible* evidence for him, if it be proved to have been made at a time when it would have charged the writer. *Vide* the opinion of Lord *Hardwicke* in *Glyn* v. *The Bank of England*, 2 *Vez.* 43. But it must be such an acknowledgment as will either render the writer responsible for the sum to another person, or will amount to an acquittal for so much of one who *appears* to have been his debtor, for the entry derives its authority from the improbability, that a man shall commit a falsehood to writing which must operate to his own disadvantage. *Vide Outram* v. *Morewood*, 5 *Term Rep.* 123. *Secondly*, Where hearsay evidence of the writer's declarations, respecting the same fact would be admissible in evidence after his death, As to prove a pedigree, &c. *Lill. Prac. Reg.* 552. *Zouch* v. *Waters*, 12 *Vin. Abr.* (*T. b.* 87.) *pl.* 5. *p.* 90. *Woodnoth* v. *Lord Cobham*, *Bunb.* 180. *et vide* the instances mentioned in *Glyn* v. *The Bank of England*, 2 *Vez.* 40. *Davis* v. *Pearce*, 2 *Term Rep.* 53. *Outram* v. *Morewood*, 5 *Term Rep.* 123. *Thirdly*, In the case of ecclesiastical dues, entries in the parson's books have been received as evidence for his successor. *Per Lord Hardwicke* in *Glyn* v. *The Bank of England*, 2 *Vez.* 43. *Anon. Bunb.* 46, But this is considered as an anomalous case *per* Lord *Kenyon*, C. J. *Outram* v. *Morewood*, 5 *Term Rep.* 123. *Fourthly*, In the case of shopkeepers' books; these when in the hand-writing of servants used to make entries therein, have upon proof of such book-keeper's death and hand-writing been admitted in evidence for the tradesman. But entries in his own hand are not so, 2 *Vez.* 43. It seems formerly to have been the opinion that these books were in themselves evidence for the tender, unaccompanied by any circumstances vouching their authenticity, and the 7 *Jac.* 1. *c.* 12. taking that for granted, was made to restrain their admission to a year from the date of the

without this circumstance they would have presumed a surrender; and desired it might be taken notice of, that they did not require any evidence to fortify the presumption, after such a length of time (2).

the entry. *Per* Lord *Hardwicke*, who cites the authority of Lord *Raymond*, 2 *Vez.* 43. In *Pitman* v. *Madox*, *Salk.* 690. they seem to have been so admitted. But in subsequent cases the judges have required that it should be proved by some circumstances attending the manner in which the books were kept, and the entries made therein, that they are not fabricated to support the cause in which they are to be produced; and according to the strength or weakness of these corroborating circumstances, they have been allowed or refused to be laid before the jury. *Vide Lord Torrington's* case, *Salk.* 285. *Evans* v. *Lake*, *Bull. L. N. P.* 282. 2 *Vez.* 43. S. C. where they were admitted; and this last case has been said by Lord *Hardwicke* to go a great way, 2 *Vez.* 43. *Ib.* 55. and see *Clerk* v. *Bedford*, *Bull. L. N. P.* 282. where they were rejected.

(2) In *Goodtitle* v. *Duke of Chandos*, 2 *Burr.* 1072. Lord *Mansfield* speaking of this case, in which he was of counsel, says, that the court relied upon the positive proof of the surrender by the entry, and did not mean to say that they required no evidence to fortify the presumption arising from such a length of time; "but that they would not require positive proof in a case where there was a sufficient presumption." But in p. 1075. he states *from his own notes*, that the court did say in this case, that after a recovery of 40 years standing they would without any other circumstances presume a conditional surrender. In the case of *Goodtitle* v. *Duke of Chandos*, the *possession* not having gone with the recovery, *B. R.* would not presume a surrender by the tenant for life. *Wilmot* J. was of opinion, *ib. p.* 1075. that length of time alone is nothing: the presumption must arise from facts or circumstances arising within that time. And by Lord *Mansfield*, "Possession of the tenant in tail after the death of the tenant for life, does leave a ground of presumption that there was a surrender," *Ibid.* 1076. See also *Keen* v. *Earl of Effingham*, *post.* 1267. and the opinion of *Comyns C. B.* 4 *Com. Dig. Title Evidence*, (A. 4.)

[1130]

Goater *vers.* Nunnely.

Rule made for a plaintiff to produce his books.

THE dispute was between the plaintiff a factor in *Smithfield*, and the defendant a grasier: and upon the defendant's motion the court made a rule for the plaintiff to shew cause, why he should not produce at the trial the several books wherein he enters the accounts of beasts sold and of monies received on the defendant's account. The plaintiff shewed no cause, so upon an affidavit of service the rule was made absolute (1).

(1) *Vide Gracewood* v. ——— *Barnes*, 439. *Sed vide Ward* v. *Apprice*, 6 *Mod.* 264. and *Rex* v. *The Fraternity of Hostmen in Newcastle*, *post.* 1223.

Dominus Rex *verf.* Ford.

THE court was moved for an information againft a church-warden, for refufing to collect money on a brief for fire, according to the act 4 *Ann. c.* 14. and the cafe of informations granted for not burying in woollen was cited. *Sed per curiam*, That is of a public nature, and wherein the revenue is concerned: and befides, in this cafe there is a penalty given, and a method for obtaining it. So no rule was made. No information for not collecting brief money.

Smith *verf.* Clarke et al'.

THE plaintiff declared in trefpafs for entering his houfe, continuing there forty-eight hours, difturbing him in his poffeffion, and eating and confuming twenty pound of beef, fpecifying alfo feveral quantities of mutton, veal, lamb, beer and ale. The jury found for the plaintiff, and half a guinea damages, And the queftion was, whether the plaintiff fhould have full cofts; which upon confideration were awarded him; for as to the goods it is in the nature of an action of trover, and here is to all purpofes an afportation, which always carries cofts. Where the plaintiff fhall have full cofts.

Rivers *and* Lite.

UPON error *e C. B.* it was held actionable to fay of the plaintiff, *You did fhut up my fifter* (meaning *Anne* the late wife of the plaintiff and fifter of the defendant) *and murder her, and I will prove it*; notwithftanding a long ftring of old cafes were cited to the contrary (1). And the judgment was affirmed. Words. 1 Vin. Abr. 503. pl. 41.

(1) *Com. Dig. Action upon the cafe for defamation.* (D. 2.) 250. (F. 3.) 266.

Shepley *verf.* Marfh. [1131]

THE plaintiff declared on a bond dated 6 *January* 1728. The defendant pleaded *non eft factum*, and in the iffue delivered, the bond was defcribed as in 1738, and the iffue was received, and paid for without any objection. The record of *nifi prius* was 1728, and no defence being made, the court was now moved to fet it afide, as varying from the iffue delivered. If the record of *nifi prius* agrees with the declaration delivered, a variation in the iffue delivered is not material (1).

(1) *Vide Thompfon* v. *Simpfon*, *Barnes* 475. *Leeman* v. *Allen*, 2 *Wilf.* 160.

But

But the court refused to set aside the verdict, for the defendant's plea upon record was not altered by it; the issue tried being, whether he executed a bond in 1728. Besides, he should have refused the issue, if not agreeable to the declaration.

Dominus Rex *verf.* Woodfall.

Costs on informations. 4 & 5 W. & M. c. 18.

UPON trial of an information for a libel, the jury acquitted the defendant contrary to the direction of the court. Upon which the defendant moved above for costs on 4 & 5 *W.* & *M.* *c.* 18. which provides, that in cases where the defendant is acquitted, the court is authorised to award costs to the defendant; unless the Judge shall at the trial certify there was a reasonable cause. In this case no such certificate was asked; but it was insisted on for the prosecutor, that it was discretionary in the court. The Chief Justice certified *ore tenus*, that it was a verdict against evidence; but then he and all the others held, that it was now too late to inquire into the probable cause; and that it was not discretionary, but compulsory upon them, where there was no certificate (1). So the defendant had his costs.

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(1) *Rex* v. *Davis*, adj. *Mich.* 10 *Anne.* 2 *Hawk. P. C. ch.* 26. *f.* 12. 7 *ed. vol.* 4. *p.* 92.

Between the Parishes of Hasfield *and* Furley in Gloucestershire.

A child cannot be with the grandmother for nurture, and a boy with her cannot be removed if he has an estate in the parish. Burr. Sett. Ca. 147. S. C.

UPON a special order of sessions relating to the settlement of a boy of eight years and a girl of six, who had been removed by two justices from *Furley* to *Hasfield*, it was stated, that the mother of these children had an estate of 4 *l. per annum* in *Furley*, where she and her husband lived and had these children; that she dying, the husband became tenant by the curtesy, and whilst such he took 30 *l. per annum* in *Hasfield*, and lived one year there with his two children, and then died: that the children being found with their grandmother at *Furley*, were both removed to *Hasfield*: which order the sessions confirmed.

And now the court upon argument confirmed the orders as to the girl, but quashed them as to the boy. For as to the boy he was

was tenant in fee of the 4 *l. per annum*. And though it was not stated, that he was actually upon that spot; yet it was enough, that he had such an estate in the parish, from which he could not be removed. But as to the daughter it was otherwise, she could demand no maintenance out of her brother's estate: and it was never yet determined, that children should go to a grandmother for nurture. She may indeed be charged to contribute to their relief in the parish where they are settled.

Blakey *verf.* Birmingham.

Amendment. Post. 1156, 1182.

THE judgment was, that the plaintiff *should* recover, instead of *do* recover. And after error, the court amended it as the misprision of the clerk (1).

(1) *Foster* v. *Blackwell, C. B. Barnes* 7. *acc. et vide Waldeck* v. *Cooper*, 2 *Wilf.* 16.

Between the Parishes of Ovingdon *and* Northoram in Yorkshire.

Money advanced for cloaths need not pay the apprentice duty. 8 Ann. c. 9. f. 39. Burr. Sett. Ca. 145. and Sett. Ca. Ed. 1750. vol. 2. p. 196. no. 144. S. C.

UPON the settlement of an apprentice, it was stated, that the mother proposed to put him out to an inhabitant of *Northoram*, who refused to take him, because he wanted cloaths; upon which the grandfather agreed, that he would pay 30 *s*. to the master to cloath the boy withall: in pursuance of which the master did lay out 30 *s*. in cloaths for him, and he was bound by indenture, in which no mention is made of the 30 *s*. nor was any duty paid. That the grandfather paid the 30 *s*. and the apprentice served out his time, which the sessions adjudge to be a settlement. *Et per curiam*, The order was confirmed: for this is not like the case of *Curenden* v. *Laland*, where there was money actually given to the master, for his own use; whereas here the master is a mere agent of the grandfather's to lay out 30 *s*, for him. And it could make no difference, whether the master did it or any body else. That this was not a case within the intent of 8 *Ann. c.* 9. § 39. the positive words of which, in a case exprefsly within it, obliged the court in the other case to hold it no settlement (1). Ante 903.

(1) *Rex* v. *Leighton*, 4 *Term* *Vide* also *Rex* v. *Portsea*, *Burr. Rep.* 732. *Nol. Rep.* 100. *S. P.* S. C. 834.

Trinity Term

* 13 & 14. See Burr. Settl. Caf. 150. pl. 50. n. to 2d ed.

* 13 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Juſtice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Juſtices.*
Sir William Chapple, *Knt.*

Sir Dudley Ryder, *Knt. Attorney General.*
Sir John Strange, *Knt. Solicitor General.*

Adams *verſ.* Ruſh.

Prohibition to ſettling churchwardens accounts. Ante 974. 17 Vin. Abr. 600. n.

PER curiam, The ſpiritual court has no juriſdiction to ſettle a churchwarden's accounts. And a prohibition was granted after ſentence allowing the accounts, and an appeal to the Arches.

Dominus Rex *verſ.* Weſtbeer.

The ſtealing a commiſſion to ſettle boundaries is not felony. Where the facts ſtated upon a ſpecial verdict upon an indictment for felony do not amount to felony, but are a great miſdemeanor, judgment cannot be given as for a treſpaſs. 2 Seſſ. Ca. p. 378. no. 202. S. C.

UPON a *certiorari pro rege* to the *Old Bailey,* an indictment for larceny, and a ſpecial verdict thereupon, were returned into the King's Bench. The indictment ſet forth, that the priſoner feloniouſly ſtole a parchment writing purporting to be a commiſſion 10 *Ann.* out of the court of Chancery, to ſettle the boundaries between two manors, and aſcertain the height which the defendant in the cauſe had a right to keep water up to, in a pond in his ground; and alſo another parchment writing purporting to be a return of the commiſſioners thereto: which commiſſion and return were reſpectively laid to be of the value of 2 *s.* and were of the goods and chattels of the King. Upon

Not

ot guilty pleaded, the jury find that two parchment writings
fwering the defcription in the indictment in the year 1712,
re brought into the fix clerks office in *Middlefex*, belonging
the court of Chancery, and the proper office wherein to re-
rd and keep them, as records of that court, where they were
cordingly kept till 28 *October* 1738, when the prifoner pri-
tely carried the fame out of the office with an intent to fteal
fame: that they were the King's goods, and each of the va-
of one penny; and that in 1717, the caufe was at an end.
l utrum, &c. et fi, &c.

This cafe was twice argued at the bar, 1. By Mr. Solicitor eneral for the crown, and Serjeant *Hayward* for the prifoner; d 2. By Mr. Attorney General and Mr. *Barnardifton*.

On the part of the crown it was argued, that upon the whole cord the prifoner was guilty of *petit* larceny. In order to prove is, two things were infifted on, 1. That this was *petit* larceny, cording to the general nature of it. And 2. That no objec- n lies from the nature of the parchment writing, or its being record, to bring this taking away to be under the degree of lony.

As to the firft, it was obferved, that there was no difference the defcription of the offence (except in point of value) be- een grand and *petit* larceny, but both are confidered as two ecies of fimple larceny. That the definitions of fimple larceny be met with in all the ancient writers do not materially differ. *racton, lib.* 3. *c.* 32. *p.* 150. *b.* defines it to be *fraudulenta con- actatio rei alienæ cum animo furandi, invito domino cujus res illa erit. Britton, c.* 15. *p.* 22. ufes the words *de ceux a qui les cho- ferront, ou par ceux hors de qui garde le chofe avera efte trove em- ou robbe.* And with thefe defcriptions agrees *Fleta, lib.* 1. *c.* 3. *p.* 54. In 3 *Inft.* 107. it is ftiled, the taking away the mere rfonal goods of another: and in *Bro. Corone* 190. the felonious king of any thing wherein another hath property.

Now as to the firft part of the defcription, *fraudulenta con- actatio animo furandi,* it is found that the prifoner privately which anfwers to *invito domino*) carried the fame out of the office ith an intent to fteal the fame. That it was *res aliena* is exprefsly und, the verdict being, that it was the property of the King; d a value is found, which reduces it to *petit* larceny. Here e property is found as a fact, and cannot be faid to be a falfe nclufion of the jury, for the crown has the records in their ftody. And in 3 *Inft.* 71. it is called the King's treafury of dgments, with which agrees *H. P. C.* 650. Though the

1 parchment

parchment be originally paid for by the party; yet when once made a record, he cannot take it away. And so it is as to the rolls of the lord of the manor. The *animus furandi* is the substance, and no nice distinctions as to the property should be received. *Parochiani* are no corporation, and yet the stealing *bona parochianorum* is indictable. *Dalt.* 373. *Stamf.* 25. *b.*

But then the objection arises, that though this may *prima facie* fall within the general description of larceny; yet the nature of this parchment writing, or its being a record, furnishes an exception out of the general rule, and proves this not to be such a thing, of which a felony can be committed.

In order to obviate this objection, it will be necessary to examine a little the grounds upon which it stands. How slender a reason soever there was at first for the distinction, yet it must be agreed to be now too late to contend, that as to *choses en action*, or what belongs to the realty, a felony can be committed of them; and the reason given in 1 *Hawk.* is, that these things generally speaking being of no use to any but the owner, are not supposed to be so much in danger of being stolen, and therefore need not be provided for in so strict a manner, as those which are of a known price and every body's money. So that if I steal a skin of parchment worth 1 *s.* it is felony; but when it has 10,000 *l.* added to its value by what is written upon it; it is no offence to take it away.

The use to be made of this observation is, that so far as the law is settled, it is not to be altered: but if it does not exempt this particular case, there is no reason to exclude it.

Now what are exempted? 1. Chattels real. Is this one? No. 2. *Choses en action*, which this is not. 3. Charters concerning the inheritance. In those the heir has a property, and they go to him, and he may bring detinue for them. But these records he has no right to the custody of, nor will such an action lie for them.

The case from whence all the law books have received the notion upon which the defence is founded, is 10 *E.* 4. 14. by which case it is determined, that felony cannot be of charters which concern the realty, which says the book *cannot be valued.* But that reason does not hold here. It is well known that taylors, drum-makers, &c. do buy these things: and besides, the jury have expresly found them to be of value. Would stealing an heir loom not be felony? Certainly it would, and yet that savours of the realty.

The

The next part of the objection is, that these were records, and this not being laid as a case upon the statute 8 *H. 6. c.* 12. cannot be now maintained as a felony at common law. It must be agreed, this is not a case within that statute, as wanting one circumstance thereby required, *viz.* whereby any judgment shall be reversed. But then another use is made of this statute, to shew that stealing records was no felony at common law, else say they, what need was there of the statute? Now it is apprehended, no such inference can be well drawn from thence. The words are, "That if any record, *&c.* shall be willingly "stolen, taken away, withdrawn, or avoided, by any clerk or "other person, who shall be duly convicted by inquest of clerks "of the court, they shall be adjudged felons." From whence and my lord *Coke*'s comment upon it, 3 *Inst.* 71. it appears, there was a plain use for this statute; for where clerks were intrusted with the custody, they had thereby such a possession, that they could not commit felony by embezzling them; and it was therefore necessary to provide for this by a positive law, as also to introduce a new method of trial. And it is observable, that my lord *Hale*, 1 *H. P. C.* 646. treating of this statute, after dividing his argument into how the law stood *before* the act, and how *after*, says nothing of the act of stealing by a mere stranger; but begins with saying, that at common law the undue razure or embezzling a record was a great offence, for which even a Judge was punishable by fine and imprisonment, as in Judge *Hengham*'s case in the time of *Edward* the First. Wherefore it was prayed on behalf of the crown that the prisoner might be adjudged guilty of *petit* larceny.

E contra it was argued for the prisoner, that this is one of the exempted cases. It was admitted, that this was neither a chattel real nor a *chose* in action. But it was contended to be a thing that concerned the realty, as it related to the boundaries of manors and the height of water, which are points in which the very inheritance is affected. That these were of that nature which are called *nullius in bonis*, things whereto every man has a right to resort and to use them. And admitting they are in the custody of the crown, (and they can be but in one custody) it will not follow, that they are the property of the crown. There are two sorts of right, *jus proprietatis*, and *jus possessionis*.

That this is the first attempt of the kind, which according to *Co. Lit.* 81. *a.* is a strong argument against it: and the case 10 *E.* 4. was the opinion of all the Judges in the Exchequer Chamber. That the 8 *H. 6. c.* 12. was always considered as intirely a new law: wherefore judgment was prayed for the prisoner.

The

The court did not meddle with the question, whether this was properly said to be the goods of the King, nor with the question upon the 8 *H. 6. c.* 12. or as to stealing records at common
[1137] law: but said, the point of these writings concerning the realty,
Dalt. 173. was sufficient to found their judgment upon. They said there was a strong inclination in the Judges to make lodgers guilty of felony; but it was not done but by act of Parliament. And if there is any inconvenience in the present judgment, it may be rectified in that way.

They all therefore declared their opinions that the prisoner was not guilty.

Then the Chief Justice started a question, whether as this was undoubtedly a great misdemeanor, they could not give judgment as for a trespass; and desired that might be considered, and the prisoner brought up again at another day. And then Mr. Attorney and Solicitor cited 2 *Hawk.* 440. that if on a general indictment for felony a special verdict is found, and the crime be adjudged but a trespass; judgment may be given upon it, as for a trespass only. And *Cro. Jac.* 497. where on indictment for felony in stealing 18 *d.* the jury found, the defendant couzened the prosecutor out of the money; held no felony, but set six times on the pillory, as for a misdemeanor. They also cited 1 *And.* 351. *Kelyng* 29. *Dalt.* 331.

2 Hawk. P. C. Ch. 47. s. 6. ed. 7. 462. Vide ante 1019.

E contra it was insisted, that by this means a defendant is deprived of many advantages; if he was indicted properly, he might have counsel, a copy of his indictment, and a special jury: and it was observed that in the great case 10 *Ed.* 4. the Judge dismissed the prisoner. Besides now *felonicè* is struck out, where is there any breach of the peace, for the verdict doth not find the taking was *vi et armis.*

Et per curiam, The prisoner must be discharged; in the cases cited *pro rege,* the Judges appear to be transported with zeal too far. The prisoner was discharged.

Folkes *vers.* Docminique.

The spiritual court may take a bond for a due administration where it is *cum testamento annexo.*

THE plaintiff declares on bond in the *detinet* against the defendant as administrator *durante minori ætate* with the will annexed: and upon *oyer* the condition appears to be, for exhibiting an inventory and duly administring by paying debts and

4 Burn's Eccl. L. 206. 774. 1 Ld. Raym. 86. ib. 563. 1 P. Wms. 7. ib. 547.

and legacies, the performance of all which the defendant avers: the plaintiff replies, that he had not paid a legacy of 1,500 *l.* though he had more than sufficient to pay all the debts, to wit, 500 *l.* And on demurrer it was objected, that this was a void bond, not warranted by 21 *Hen.* 8. *c.* 5. or at common law, by requiring an administrator to pay legacies or distribute according to the ecclesiastical decision; and should be taken to be obtained by coercion. 1 *Vent.* 166. *Raym.* 227. [1138]

E contra it was argued, that this not being on an intestacy, was not according to the statute it is true; but is to be supported as a reasonable bond taken by the course of the ecclesiastical court. *Hob.* 250. *Co. Ent.* 128. And though formerly it was disputed, yet it is now settled, that they may compel distribution. *Mo.* 864. 2 *Show.* 396. 2 *Lev.* 163. 2 *Jon.* 90. 1 *Saund.* 162. That here the breach is assigned in non-payment of legacies, of which they have undoubted jurisdiction: and if it be good in any part (being a bond at common law) it is enough. 3 *Co.* 83. And it differs from the case where part of the condition is against a statute, for there it is void *in toto.*

Et per curiam, These administrations are not within 21 *Hen.* 8. and therefore we deny a *mandamus* (1). We must therefore consider it as a bond at common law; and then it is sufficient, if it be good in that part on which the breach is assigned (2), as we think this is, and we cannot take it to be a bond by coercion. Therefore the plaintiff must have judgment.

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(1) *Smith's Case, ante* 892. *R. Acc.*

(2) See in *Chessman* v. *Nainby ante* 744.

Dominus Rex. *vers.* Greenwood.

HE came up on *habeas corpus* charged with a commitment for a robbery on the highway. And the prosecutor attending, insisted he was the man. And though eight affidavits of credible persons, proving him to be at another place at the time the robbery was sworn to, were read; yet the court refused to admit him to bail, but ordered him to remain till the assizes.

Bail.
Vide 2 Hawk. P. C. ch. 15. f. 80. 7 ed. vol. 3. p. 225. n. *.

Hardwick *verf.* Chandler.

Words, of an attorney.

IN an action by an attorney, the following words fpoken of an attorney in his bufinefs were upon motion in arreft of judgment held actionable. "Mr. *Hardwick* is a rogue, for "taking your money, and has done nothing for it; he has not "entered an appearance for you; he is no attorney at law; he "don't dare to appear before a judge. What fignifies going to "him? He is only an attorney's clerk and a rogue, he is no "attorney (1)."

(1) *Day* v. *Buller*, 3 *Wilf.* 59. *Vide* the cafes collected 1 *Com. Dig.* Action upon the cafe for defamation. (D. 24.) 259. (F. 9.) 269.

[1139]

Elliot *verf.* Smith.

Practice on *fcire facias* and execution againft bail.

IT was held, that if there be fifteen days between the *tefte* of the firft and the return of the fecond *fcire facias* againft bail, it is fufficient; without any regard to the number of days between the *tefte* and return of each (1); and that a *capias ad fatisfaciendum* may be taken out againft bail, without any *fieri facias* or return of *nulla bona* (2).

(1) 2 *Cromp. Prac.* 84. *Imp. Prac. K. B.* 433.

(2) 1 *Lev.* 226. 1 *Roll.* 897. *L.* 35. 2 *Cro.* 450. 3 *Salk.* 28?. But where there is only one *fcire facias* againft bail, the fheriff returning *fcire feci*, and the proceedings are by bill four days exclufive, are fufficient between the tefte and return of it. *Bell* v. *Jackfon*, 4 *Term Rep.* 663.

Dominus Rex *verf.* Whaley.

To a *mandamus* to admit a fellow of a college the court will expect the return of a vifitor, and will not fuperfede the writ. Ante 565.

A *Mandamus* was granted, directed to the defendant as mafter of *Peter-houfe* college in the univerfity of *Cambridge*, to admit *Thomas Rogers* to a fellowfhip of that college, upon an affidavit of his election. A motion was made to fuperfede this writ, upon affidavits of there being a vifitor, *viz.* the Bifhop of *Ely*. But the court put the mafter to make a return, and refufed to determine the point on affidavits, where the other party had no opportunity to right himfelf by an action.

Between the Pariſhes of King's Norton *and* Cambden in Glouceſterſhire.

MARY Calcut a *pauper* was removed by two juſtices from *King's Norton* to *Cambden*. On appeal the ſeſſions reverſed the order, ſtating that the *pauper* was hired for a year to *Ellis* of *Cambden*, to ſpin yarn at 18 *d*. *per* ſtone, and that ſhe was to provide herſelf with victuals and lodging. That ſhe ſpun the whole year, and boarded and lodged at her maſter's, allowing 2 *s*. *per* week for the ſame: but upon her examination ſhe ſaid, that by her contract ſhe thought herſelf at liberty to play or be abſent from her work as long as ſhe pleaſed, only that ſhe was not at liberty to work for any other maſter (1). Hiring for a year to work by the piece gains a ſettlement. Burr. Sett. Ca. 152. and 2 Seſſ. Ca. 146. S. C.

Et per curiam, The ſeſſions have done wrong in adjudging this no ſettlement in *Cambden*, for in fact here is a hiring and ſervice for a year to the maſter there: and what her apprehenſion was, or whether ſhe was paid by the year or by the quantity of her work, was immaterial (2). And therefore the order of ſeſſions was quaſhed, and the order of the two juſtices confirmed.

(1) *Rex* v. *Birmingham*, *Cald.* 77. *Doug.* 333. *S. P.* C. 655. *Rex* v. *Seaton and Beer*. 2 *Bott by Conſt.* 352. *pl.* 341.
(2) *Rex* v. *Dedham*, *Burr. S.* S. P.

Chapman *verſ.* Houſe, Slater and Goodacre. In Middleſex. [1140]

IN treſpaſs for taking goods and falſe impriſonment, *Houſe*, one of the defendants, let judgment go by default; *Slater*, another defendant, demurred; and *Goodacre* pleaded Not guilty. It came on to aſſeſs damages as to *Houſe*, to aſſeſs contingent damages as to *Slater*, and for trial as to *Goodacre*, who was acquitted: but then the queſtion came between the other two, whether the jury could ſever the damages. And *Lane* v. *Santelee* (*ante* 79.) and *Lowfield* v. *Bancroft*, (*ante* 910.) were cited. The Chief Juſtice was of opinion, that as they had not pleaded jointly, the damages might be ſevered. So the jury gave 1 *s*. as to *Houſe*, and 100 *l*. as to *Slater*. Where there were ſeveral defendants, damages were ſevered. (1). Carth. 19.

(1) Where in treſpaſs all the defendants ſuffer judgment to go by default, the damages cannot be ſevered, *Onſlow* v. *Orchard*, *ante* 422. So where two having pleaded, and the iſſue is found againſt both and damages given, and a third has let judgment go by default, and damages are aſſeſſed againſt him for a writ of enquiry, *&c.* judgment is entered for both, it is bad. *Long* v. *Sabin*, 1 *Wilſ.* 30. and ſee *Hill* and *Winſey* v. *Goodchild*, where the plaintiff having declared upon, and the jury found a joint treſpaſs, the court held that the damages could not be ſevered. *B. R. Tr.* 11 *Geo.* 3. 5 *Burr.* 2790. *Bull. L. N. P.* 94.

Michaelmas Term

14 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*
Sir Edmund Probyn, *Knt.* } *Justices.*
Sir William Chapple, *Knt.*

Sir Dudley Ryder, *Knt. Attorney General.*

Sir John Strange, *Knt. Solicitor General.*

Harvey *verf.* Harvey. In Middlefex.

Executor and not the heir fhall have hangings, *&c.* 2 Com. Dig. Biens (C.) 136. Bull. L. N. P. 34. 2 Burn's Eccl. L. 648.

IN trover by the executor againft the heir, the Chief Juftice held, that hangings, tapeftry, and iron backs to chimnies, belonged to the executor: who recovered accordingly againft the heir.

Ratcliffe, un', &c. *verf.* Befley.

An attorney muft be fued by bill, though the plaintiff be alfo an attorney.

IT was held by the court, that if the plaintiff and defendant are both attornies, the defendant muft be fued by bill; and that the plaintiff cannot take out an attachment, and hold the defendant to bail, as he does in the cafe of a common perfon. This cafe therefore is an exception out of the general rule, that privilege takes away privilege (1).

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(1) *Thompfon* v. *Rafh*, *Barnes* 44. *Shorter* v. *Packhurft*, 1 *Black. Rep.* 19. *Contra* if they are of different courts, *vide ante* 837. and the note.

Rich,

Rich, on the demise of Lord Cullen et al' *verf.* Johnfon et al'.

IN ejectment for mines the plaintiff proved himfelf lord of the manor, and that he was in poffeffion thereof. But the fame witnefs proving, that the defendants had had poffeffion of the mines above twenty years; the court upon a trial at bar held this no evidence to avoid the ftatute of limitations, there being no entry within twenty years upon the mines, which are a diftinct poffeffion, and may be different inheritances: and therefore directed the jury to find for the defendants.

In ejectment for mines the poffeffion of the manor is no evidence to avoid the ftatute of limitations. Bull. L. N. P. 102. S. C.

Ifon *verf.* Fowen.

THE notice was to execute a writ of inquiry by *ten* of clock: and there being no defence made, the court fet it afide for uncertainty (1).

Practice.

(1) *Vide Langftaff* v. *Lamb*, *Barnes* 293. *Fofter* v. *Smales*, *Ib.* 295. But notice to execute it *at* ten being certain is good, *Laft* v. *Denny*, *Barnes* 302.

Afhley *verf.* Afhley.

THE Judge who tried this caufe (which was upon a promiffory note for 5000 *l.* which the defendant infifted was forged) certified that the weight of the evidence was with the plaintiff, and he thought the jury would find for the plaintiff; but they found for the defendant.

No new trial where there is evidence on both fides.

Et per curiam, As there was evidence on the part of the defendant, the jury are the proper judges which fcale preponderates. It cannot be faid to be a verdict againft evidence, and therefore we will grant no new trial. The next day between

Smith *et* Huggins et al'.

THE fame rule was laid down, and a new trial denied: though there was but a weak evidence for the plaintiff, and the Chief Juftice fummed it up ftrongly for the defendant (1).

(1) *Anon.* 1 *Wilf. Hankey* v. *Trotman*, 1 *Black.* 1. S. P. and *Smith* v. *Parkhurft*, *ante* 1105. But as the diftinction between a verdict againft evidence

evidence and againſt very weak evidence muſt in many inſtances appear ſcarcely perceptible, and the granting new trials is intirely diſcretionary in the court, it rather ſeems as if the ſeveral caſes upon the ſubject warrant the concluſion that the court will grant a new trial where the verdict is *manifeſtly* againſt the weight of evidence, although ſome proof has been adduced on the other ſide. Provided injuſtice ſeems to have been done by the verdict, and the cauſe is of ſufficient value. *Vide Berks* v. *Maſon, Say.* 264. *Norris* v. *Freeman,* 3 *Wilſ.* 39.

[1143] Dominus Rex *verſ.* The Inhabitants of Welbeck in Nottinghamſhire.

It is a good return to a *mandamus* for appointing overſeers that the place is not a village or townſhip. 2 Seſſ. Ca. p. 198. No. 145. 1 Bott by Conſt. 24. pl. 43.

MANDAMUS ſuggeſts that there are ſeveral houſholders and farmers inhabiting and reſiding within the village of *Welbeck*, able to provide for the poor; and therefore commands the juſtices to appoint overſeers of the poor. To this it is returned, that *Welbeck* is extraparochial, and is not, nor ever was reputed to be a village or townſhip, and therefore they cannot appoint any perſons to be overſeers.

And upon argument this was held to be a good return. For though it does not anſwer the ſuppoſal of the writ, as to there being ſeveral ſubſtantial houſholders and farmers; yet it anſwers the point in 13 & 14 *Car.* 2. *c.* 12. by ſaying it is no townſhip or village, or reputed as ſuch: and it is to ſuch places only that we can ſend a writ. (1)

Ante 512, 1071.

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(1) Vide *Rex* v. *Severn and Arnold, Say. Rep.* 278. *Rex* v. *Juſtices of Bedfordſhire. Cald.* 167. *Rex* v. *Juſtices of Peterborough. Ib.* 238.

The Caſe of Jonathan Evindon, an Attorney.

An attorney in *London* cannot be ſummoned on the militia. Where it is a perſonal ſervice, it is a perſonal ſervice although it may be executed by deputy.

HE being ſummoned to appear upon a muſter of the militia in *London*, applied to the court for a writ of privilege, to be directed to the commiſſioners of lieutenancy: which being oppoſed, as not being a perſonal ſervice, but what might be executed by deputy, it was argued largely at the bar. And the court having taken time to conſider of it, this term gave their opinion: that this writ ought to go; for though by the 13 & 14 *Car.* 3. *c.* 3. this in reſpect of counties at large may be only a charge in proportion to the property of the inhabitants; yet the 27th ſection excepting *London*, and referring to the then commiſſion of array; we think it was then conſidered as a perſonal ſervice; and there can be no doubt but that in ſuch caſe an

an attorney, who has a ſuperior ſervice, is to be exempted. And though he may have a deputy, that has been determined to make no alteration. *Mar.* 30. 1 *Vent.* 16, 29. 1 *Lev.* 265. *Cro. Car.* 11. And theſe writs have often been granted. *Co. Ent.* 436. *Off. Br.* 164, 174. In 4 *Ann. Smith's* caſe by *Holt*, and one to Mr. *Skynner* in Lord *Raymond's* time. The Chief Juſtice alſo declared, that on the like motion in *C. B.* for an attorney of that court, they were alſo of the ſame opinion (1).

(1) This ſeems to be *Heaton's* caſe, *Rep Barnes* 42, *S P.* But ſince 2 *Geo.* 3. *c.* 20. *ſ* 42. the militia acts having allowed a commutation of ſervice into a payment of 10*l.* it has been held that an attorney is not entitled to this writ to exempt him from ſerving in the militia, it being no longer deemed to be a perſonal ſervice, upon which ground alone he could be entitled to it. *Gerard's* caſe. 2 *Black. Com.* 1123. Vide alſo *Mayor of Norwich* v. *Berry*, 4 *Burr.* 2109.

Elletſon *verſ.* Cummins. [1144]

DEBT upon an arbitration bond, whereby the plaintiff and defendant ſubmitted all matters in difference between them or either of them. The arbitrators awarded 30*l* to the plaintiff in full of all demands, either in her own right or as executrix to her huſband. And on demurrer it was inſiſted, that the arbitrators had exceeded their authority. And *Carth.* 118. was cited, and the caſe put of a grant of *omnia bona et catulla ſua*, which does not paſs goods *en autre droit.*

A demand as executrix is within a general ſubmiſſion to an award. Ante 647.

But the court held, that the ſubmiſſion was general enough. For the demand as executrix was a matter depending between them. And 1 *Roll. Abr.* 246. *pl.* 2, 3. 3 *Bulſt.* 65. are ſtrong to this purpoſe. And though in *Cro. Car.* 433. there is an averment, that both ſorts of demands were ſubmitted, yet the court held it was not neceſſary. And the plaintiff had judgment.

21 H. 6. 19.

Dominus Rex *verſ.* Obrian.

INDICTMENT ſetting forth, that defendant intending to defraud the King, and unjuſtly to procure a payment to be made as to the widow of an officer, did knowingly publiſh a certain falſe and counterfeit affidavit, purporting to have been ſworn by one *Elizabeth R—*, before *Thomas Fengier*, Eſq; a juſtice of the peace, by which means he received 5*l.* 6*s.* 8*d.* of the paymaſter

Publiſhing a falſe affidavit knowingly is an offence at common law. 2 Seſſ. Ca. p. 366. No. 196. S. C. Vide 9 Geo. 3. c. 30. ſ. 6.

paymaſter of the King's bounty. And this was laid as an offence at common law.

Ante 747.

After verdict for the king, it was moved in arreſt of judgment, that this not being laid to be forged by the defendant, was not an offence at common law, but he ought to have been indicted on 33 *H.* 8. *c.* 1. as for a falſe token. *Sed per curiam*, Since *Ward's* caſe this can never be doubted. And it has always been held, that the ſtatute did not create a new offence, but only added a further puniſhment where the indictment is *contra formam ſtatuti*. The 5 *Eliz. c.* 14. reciting the forgeries at common law, has the word *writings*, in contradiſtinction to deeds: and it is in the election of the party, in the caſe of forging deeds, to lay the indictment either at common law, or upon the ſtatute. Judgment *pro rege*.

[1145]

Marten *verſ.* Jenkin.

Where a negative finding is not neceſſary.

5 Geo. 1. c. 6. ſ. 3. See 2 Burr. Rep. 1013. n. to 2d Ed.

ON a *mandamus* to ſwear the plaintiff into the office of mayor of *Winchelſea*, it appeared by a ſpecial verdict, that the mayor muſt be choſen out of the jurats, and that the plaintiff 1 *May* 1739, was choſen a jurat, and ſworn in, and continued ſo till 7 *April* 1740, when he was choſen mayor: that he had received the ſacrament within a year before his election to be mayor, but not within a year before he was choſen a jurat. And the queſtion was, whether the ſtatute 5 *Geo.* 1. *c.* 6. § 3. could operate ſo as to give him the benefit of the non-proſecution in ſix months with regard to the previous qualification. And the court held it did, elſe he would be under ſome degree of diſability or incapacity, when the act ſays none ſhall be incurred.

But then a doubt was made, whether as the verdict was ſilent as to any proſecution, it was ſufficient for the court to give judgment upon; and whether it ſhould not have been found negatively, there was none. But the court held it well enough, for the plaintiff had nothing more to do than to find his election; what is to avoid it, ſhould come from the other ſide: and that as it is not found, there was a proſecution, which it lay upon the defendant to ſhew; they could not be warranted in ſaying the plaintiff's election was done away: and therefore they gave judgment for the plaintiff.

Dent *verſ.* Coates.

Cuſtom, uncertain.

PROHIBITION to a ſuit in the eccleſiaſtical court for a church rate, ſuggeſting a cuſtom in the pariſh of *Northallerton*, that whenever twenty-four pariſhioners, or the major part

part of them, meet and appoint how much ſhall be raiſed throughout the whole pariſh, a certain proportion thereof has been uſed to be raiſed by the hamlet of *Romanby* by their ſeparate churchwarden, and paid over to the reſt.

Upon iſſue joined, this cuſtom is found. But then it was moved in arreſt of judgment, that this is both incertain and unreaſonable, both as to the perſons who make it, and the ſum to be aſſeſſed on *Romanby*. And *Fitz. Bar.* 277. 1 *Roll. Abr.* 565. *pl.* 4. *Bro. Cuſtom* 12. *Davis* 33. 1 *Keb.* 612. 2 *Roll. Abr.* 264. *D.* 1. 265. *pl.* 2. *Salk.* 657. *Latch.* 217. were cited.

Et per curiam, The cuſtom is ill, for it may be made at a private meeting of a few pariſhioners, and the words *a certain proportion* fix nothing. The entry on record muſt be, *non obſtante veredicto, fiat breve de conſultatione.* 2 *Town book of Jud.* 170. *pl.* 2. [1146]

Dominus Rex *verſ.* Jones.

Not taking upon him the office of overſeer of the poor is indictable.
2 Seſſ. Ca. p. 326. No. 187. 1 Bott. by Conſt. pl. 347. p. 298. S. C.

HE was indicted for not taking upon him the office of overſeer of the poor, upon a regular appointment; and on demurrer objected, that as he was to take no oath, and the 43 *Eliz. c.* 2. had inflicted pecuniary penalties for neglect of duty to be recovered in a ſummary way, he could not be indicted. *Sed per curiam*, Thoſe penalties are for neglect of duty when he is the officer, whereas this indictment ſays he has obſtinately refuſed to take the office upon him: the diſobeying an act of parliament is indictable upon the principles of the common law. Judgment for the King.

Vernon et al' *verſ.* Jefferys.

If one named in the indenture does not ſeal, he muſt be excluded by an averment.
5 Com. Dig. Pleader. (2V.2.) 618.

TEN plaintiffs bring covenant on articles of partnerſhip: and on *oyer* it appeared, there were two others named in the deed, which at the cloſe of it runs in the uſual form, *In witneſs whereof all the parties have ſet their hands and ſeals.* Thereupon the defendant demurs, and on argument inſiſted, that the *oyer* is part of the declaration; and it is as bad as if the plaintiff had ſhewn that the covenant was with two others; and it could not be ſplit into ſeveral actions. *Carth.* 301. *Lutw.* 680. 5 *Co.* 18. *Lutw.* 1544. *Allen* 41. 1 *Vent.* 34. 2 *Lev.* 74. 2 *Roll. Abr.* 22. *Et per curiam*, If the other two did not ſeal the deed, the plaintiff might have helped it by averment: but here on the *oyer* we muſt take it, they did ſeal. Beſides, as they are named in the covenant as covenantees, they might join in the action, though

though they did not feal: this the defendant may take advantage of on *oyer* and demurrer. 2 *Leon.* 47. And therefore judgment muft be for the defendant.

[1147] Dominus Rex *verf.* Inhabitantes de Petham.

A certificate man's apprentice being affigned to a parifhioner, gains a fettlement. Burr. Sett. Ca. 154. and Seff. Ca. Ed. 1750. vol. 2. p. 209. No. 149. S. C.

UPON a fpecial order it was ftated, that the *pauper* was bound to a certificate man in *Tenterden*, and after living with him there two years, was by him affigned over to a parifhioner of *Lidd*, with whom he inhabited and ferved for the remainder of the feven years. And the queftion arofe on 12 *Ann*, *ft.* 1. *c.* 18. which fays, the apprentice of a certificate man fhall gain no fettlement; whether the affignment could give him one. And the court were all of opinion, he had gained a fettlement in *Lidd*: for the act had not made the binding void, but has only taken away one of the confequences of fuch binding for the fake of the certificated parifh. It never intended to meddle with the cafe of a legal parifhioner's apprentice; and when once there is an affignment to fuch an one, it is the fame as if it had been an original binding: the true conftruction of the ftatute is, that *in refpect to the certificated parifh* fuch binding and inhabitation fhall give no fettlement. (1)

(2) *Rex* v. *High and Low Bifhopfide.* *Burr.* S. C. 381. *Rex* v. *Silton.* *ib.* 269. 1 *Wilf.* 184. *Rex* v. *St. Peter's in Nottingham*, *ib.* 391. *Say.* 287. *Rex* v. *Spotland.* *Burr.* S. C. 527, S. P. In the report of this cafe by Sir *James Burrow* it appears that the pauper's father refided then at *Lidd* under a certificate, and had done fo prior to the birth of the *pauper*. But this does not alter the law of the cafe, for the pauper having gained a fettlement by an inhabitancy in *Tenterden* of more than 40 days, the certificate granted to *Lidd* was difcharged as to him, and he became intitled to gain a fettlement there in his own right. *Rex* v. *Great Torrington*, *Burr.* S. C. 428. *Rex* v. *Keynfham*, *ib.* 429. *Rex* v. *Afhchurch in Gloucefterfhire.* *Ib.* S. P.

Hilary Term

14 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*
Sir William Chapple, *Knt.* } *Justices.*
Martin Wright, *Esq*;

Sir Dudley Ryder, *Knt. Attorney General.*

Sir John Strange, *Knt. Solicitor General.*

Walker *verf.* Kearney.

Affidavit of one convicted of forgery not to be read to support a complaint (1).

A Rule for an attachment *nisi* being granted on the affidavit of the defendant; the party complained of fhewed for caufe, that the defendant had been convicted of forgery and ftood in the pillory, and produced the record and an affidavit of the identity of the perfon. *Et per curiam*, The rule muft be difcharged, for we cannot fuffer this affidavit to be read. *Salk.* 461. 5 *Mod.* 74. *Hawk.* 461. *Mich.* 12 *Geo.* 2. *in C. B. Niccols* v. *Delahant* (*a*), the affidavit to hold to bail, being made by one convicted of forgery, was refufed to be read. Indeed in *Charlefworth*'s cafe, who had been convicted of forgery, his affidavit was read; but that was to defend himfelf againft a complaint, where the profecutor had in a manner appealed to his affidavit: but even there it was faid, that to fupport a complaint it fhould not be read (2). If he cannot be a witnefs in a

(*a*) Rep. Barnes 78. Prac. Reg. 49.

(1) *Jones* v. *Major*, *ante* 833. *Pamlock* v. *Machonder*. 2 *Wilf.* 18.

(2) Same diftinction as to the affirmation of a quaker, which is admiffible in exculpation of himfelf, where an amendment is moved for againft him. *Atcbefon* v. *Everit Cowp.* 392. *Rex* v. *Gardner*. 2 *Burr.* 1117.

civil

civil suit where a third person is interested in his evidence, *a fortiori* he shall not be received here.

Dominus Rex *vers.* Dr. Franchard.

Constable may be sworn in before a justice of peace.

HE was chosen constable of *Milborne Port* at the leet, which immediately adjourned, and he was afterwards sworn in before a single justice of the peace; and upon a motion for an information (1) as not being duly sworn, the court held it a good swearing (2). *Salk.* 175. Sir *T. Jones* 212. 2 *H. H. P. C.* 88.

(1) *Rex* v. *Goudge*, *post.* 1213. *Sed vide Rex* v. *Sir Thomas Reynell*, *post.* 1161.

(2) *Rex* v. *Davis*, *Cas. temp. Hardw.* 269. 2 *Hawk. P. C. c.* 10. *s.* 49. *p.* 103.

Bevis *vers.* Lindsell.

After judgment by default a promissory note set out in the declaration need not be proved.

IN *assumpsit* upon a promissory note, there was judgment by default, and on executing a writ of inquiry, the plaintiff did not produce the subscribing witness, but offered other evidence of its being the defendant's hand. And the court held, this was sufficient, for the note being set out in the declaration is admitted, and the only use of producing it is to see whether any money is indorsed to be paid upon it (1).

(1) *Mills* v. *Lyne*, *B. R. H.* 26 *Geo.* 3. *Bayley on Bills*, *Appen. No.* 7. *Anon.* 3 *Wils.* 155. *Green* v. *Hearne*, 3 *Term Rep.* 301. acc. *Billers et al'* v. *Bowles*, *Barnes* 233. *Ellis* v. *Wall*, *ib.* 234. *contra.*

Smith *vers.* Crabb.

Court will not consolidate declarations in ejectment. Post. 1178.

TEN declarations on the same demise were delivered for ten houses in *Stenying* in *Sussex* in the occupation of ten persons. And the court being applied to, to have them all put into one issue, suggesting that the title was the same in all; they however refused to do it, for they said the lessor might have sued them at ten different times, and it would be obliging him to go on

on againſt all, when perhaps he might be ready in ſome of them only (1).

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(1) It rather ſeems from this report, that each declaration was for a ſeparate houſe. *Vide Grimſtone* v. *Burgers*, *Barnes* 176. *Caſ. Prac. C. B.* 119. where the court of *C. B.* did conſolidate ſixteen ejectments, each declaration being for a large number of meſſuages, and all being *verbatim* the ſame. See alſo *Cecil* v. *Briggs*, 2 *Term Rep.* 639.

Gegge *verſ.* Jones.

UPON ſhewing cauſe againſt a prohibition, the court made the rule abſolute, with a direction that the plaintiff ſhould declare in prohibition: he tendered a declaration, but the defendant refuſed it, and applied to ſtay proceedings, as being willing to ſubmit. The other inſiſted he had a right to go on, and ſo get at the coſts of the motion, which he could not otherwiſe have. But the court ſtayed the proceedings without coſts; ſaying the direction to declare was in favour of the defendant, who might waive it.

Practice in prohibitions.

Easter Term

14 Georgii 2. Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*
Sir Francis Page, *Knt.*
Sir William Chapple, *Knt.* } *Justices.*
Martin Wright, *Esq;*
Sir Dudley Ryder, *Knt. Attorney General.*
Sir John Strange, *Knt. Solicitor General.*

Chapman *verf.* Pointon.

No attachment againft a witnefs unlefs reafonable expences were tendered him.

A Witnefs was ferved with a *fubpœna* at *Chefter*, to attend at the fittings at *Guildhall*, and two guineas were tendered by the perfon who ferved it, and being objected to as too little, he declared he would give no more.

The witnefs not coming up, an attachment was moved for; and on fhewing caufe difcharged: the court faying it was too little, and that the witnefs is not obliged to truft to the court's allowing him more when he comes to the book, for perhaps the party may not call him, and then it may be difficult for him to get home again: that this way of punifhing as for a contempt was new, and practifed only in this court; the Common Pleas not doing it to this day, but leaving the party to his remedy on Ante 810. 1054. 5 *Eliz. c.* 9. and therefore they would not enter into any nice calculations of the expence, but confined their inquiry to the queftion, whether the non-attendance was through obftinacy or not (1).

(1) *Stephenfon* v. *Brookes*, S. P. in *C. B. Barnes* 33.

Beardesley *verf.* Baldwin.

A Promissory note to pay money within so many days after the defendant should marry, was (on consideration) held not to be a negotiable note within the statute (1). What a negotiable note. Ante 706.

(1) *Vide Pearson* v. *Garret*, *Comb.* 227. 4 *Mod.* 242. *Roberts* v. *Peake*, 1 *Burr.* 323. *Carlos* v. *Fancourt*, 5 *Term Rep.* 482.

Wilder *verf.* Handy.

IN trespass for killing a dog: after verdict for the plaintiff, it was moved in arrest of judgment, that the declaration run by recital, "Whereas, &c. But a bill being filed right (the time of filing which the court refused to enquire into) and on citing a case of *Smith* v. *Fuller* (a), in *C. B. Mich.* 8 *W.* 3. and *Cumb.* A. the court ordered it to be amended: though they were sensible that for want of applying to amend, many judgments had been arrested. Amendment. Post. 1162.

(a) 1 Ld. Raym. 116.

Neal, on the Demise of the Duke of Athol, *verf.* Wilding et al'.

ON a trial at bar, where the Duke was to make out his pedigree as heir of the *Derby* family, he offered (amongst other evidence) a special verdict in 1706, to which the present defendants were no parties) to prove three of the descents, which verdict was given in a cause where the premisses in question were recovered on a general verdict, and the special verdict related only to other premisses. And *Wright* Justice, was for receiving it, because in the case of pedigrees many things are received which are not allowed in other cases, as entries in family books, monumental inscriptions, heralds books, recitals in deeds, &c. which were introduced from the difficulty of proving pedigrees since inquisitions *post mortem* were left off. But the rest of the court refused to let it be read, being (as they said) *res inter alios acta*, and the same evidence, for any thing they knew to the contrary, might be ready to be laid before this jury, that was before that. *Vide Carth.* 79. 181. 5 *Mod.* 386. Sir *T. Jones* 221. 2 *Mod.* 142 (1). What evidence of a pedigree.

(1) But that the opinion of *Wright* J. is now held to be the law, *vide Bull. L. N. P.* 233.

Doe, on the Demise of the Dutchess of Hamilton, *verſ.* Hatherley, et al'.

Where proceedings ſhall be ſtayed in a ſecond ejectment till coſts paid of the firſt (1).

THERE being judgment for the defendants in the great cauſe of *Thornby* v. *Fleetwood*, (ante 318.) and that affirmed in *B. R.* and the Houſe of Lords, upon the ejectments being brought by the remainder-man, in the life of Lord *Philip*, who though he had had a foreign education might conform; the Dutcheſs now, (Lord *Philip* being dead) brought a new ejectment, in which ſome of the then defendants were defendants now. And upon application to ſtay her proceedings till the coſts in the firſt ejectment were paid; the Dutcheſs inſiſted, that the former was on the demiſe of the Duke and her, and the rule was in the ſingular number, *quod demiſſor querentis ſit onerabilis*. *Sed per curiam*, We are not going to order the Dutcheſs to pay * coſts, but only preventing her from being vexatious; which in 4 *Mod.* 349. is ſaid to be the foundation of theſe rules. Beſides, in this caſe ſhe proceeded after the death of the Duke, and therefore let the rule be to ſtay proceedings in this cauſe, till the coſts in the other are paid.

Comb 106. 110.

* See Rep. and Caſ Pract. C. P. 78. n. to 2d ed.

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(1) *Vide Doe ex dem. Chambers*, 2 *Black.* 1180. and the caſes cited. *Short* v. *King*, *ante* 681.

James Baker's Caſe.

Bankrupt.

HE was taken up on an attachment for not performing an award. After which he became a bankrupt, and obtained his certificate: and now moved to be diſcharged, but was oppoſed, becauſe (it was ſaid) bankruptcy does not purge a contempt. *Sed per curiam*, This was a demand for which debt would lie, and the act ſays he ſhall not be arreſted, *proſecuted* or impleaded for any debt due before the bankruptcy. It would therefore be hard to keep him in cuſtody, when the duty is diſcharged. And therefore in this caſe he muſt be diſcharged (1).

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(1) *Vide Rex* v. *Stokes*, *Cowp.* 136.

Smith *verſ.* Abbot.

What a good acceptance of a bill of exchange. Poſt. 1212. note (4)

THE defendant accepted a bill of exchange to pay it when goods conſigned to him, and for which the bill was drawn, were ſold. And the plaintiff counted upon the cuſtom of merchants. After a verdict for the plaintiff, it was moved in arreſt

of judgment; that this acceptance depending upon the contingency of the sale of the goods was not within the custom of merchants, or negotiable. But the court (upon consideration) held it good. For though the plaintiff might have refused to take such an acceptance, and have protested the bill; yet no body can say he might not submit to it. And it will affect trade, if factors are not allowed to use this caution, when bills are drawn before they have an opportunity to dispose of the goods: a man who is drawn upon to pay at ten days sight may accept for thirty. *Molloy* 304. though the other might protest the bill. *Salk.* 129. *Cumb.* 452.

Filkes *vers.* Allen.

Prisoner is not bound to give plaintiff notice of his removal to another prison to entitle him to a superfedeas. Tidd's Prac. K. B. 210.

THE defendant in *Michaelmas* term was surrendered in discharge of his bail; and afterwards, without giving any notice to the plaintiff, was removed to the *Fleet*. The plaintiff in *Hilary* term charged him in execution as a prisoner in *B. R.* And this term the defendant moved for a *supersedeas*, that charge in the court where he was not a prisoner signifying nothing, and so two terms were elapsed. The plaintiff insisted, that he was in no default, not having notice of his removal; and that these removals do not appear upon the *committitur* book, where the charge in execution is to be made. But the court granted a *supersedeas*: for the plaintiff, they said, should have demanded to see the prisoner; and if not produced, would have known where to find him, and bring him back by *habeas corpus*, to charge him. And it would be putting difficulties upon prisoners, to oblige them to give notice.

Trinity Term

*14 Georgii 2 Regis. In B. R.

*14 & 15 See Burr. Sett. Caf. 123. pl. 58. note to 2d ed.

Sir William Lee, *Knt. Chief Justice.*

Sir Francis Page, *Knt.*
Sir William Chapple, *Knt.* } *Justices.*
Martin Wright, *Esq*;

Sir Dudley Ryder, *Knt. Attorney General.*

Sir John Strange, *Knt. Solicitor General.*

Talbot *verf.* Hubble.

Where a city has justices with an exclusive clause, the justices of the county cannot act in matters of excise.

THE queftion in this cafe was, whether as the city of *New Sarum* had an *exclufive commiffion of the peace, the juftices of the county of *Wilts* could by virtue of 12 *Car*. 2. *c*. 23. and 15 *Car*. 2. *c*. 2. act in excife matters within the city.

This cafe was argued three times at the bar, and this term the Chief Juftice delivered the refolution of the court.

1. That the crown might grant to any city, to have juftices of their own within themfelves, and exclude the county juftices from intermeddling in the ordinary bufinefs of a juftice of the peace. *Bro. Letters Patent* 111. *Dalton* 24. 2 *Inft*. 71. (1).

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(1) It was admitted in this cafe that unlefs there was a *non intromittant claufe* in the commiffion or charter, the juftices for the county would have a concurrent jurifdiction. *Vide Rex* v. *Sainfbury*, 4 *Term Rep*. 450. *Nol. Rep*. 15. dec. acc.

2. That

2. That in ſuch caſe the act of the county juſtices would be void, and not to be conſidered only as a breach of the franchiſe. 2 *Inſt.* 557.

3. That though the 12 *Car.* 2. gives the juriſdiction in exciſe matters to the juſtices of the peace reſiding near the place where the forfeiture ſhall be made, or offence committed; yet it never was the deſign of the Legiſlature to make any alteration in the reſpective juriſdictions of the juſtices, but only to veſt the exciſe juriſdiction in juſtices of counties, cities, and places, with reſpect to their ſeveral local juriſdictions within ſuch places.

Bowyer *verſ.* Bampton.

The innocent indorſee of a gaming note can maintain no action againſt the drawer. But he may ſue the indorſor upon his indorſement.

UPON a caſe ſtated at *niſi prius* in an action by the plaintiff as indorſee of ſeveral promiſſory notes, it appeared that the notes were given by the defendant to one *John Church*, for money by him knowingly advanced to the defendant to game with at dice, and that *Church* indorſed them to the plaintiff for a full and valuable conſideration, and that the plaintiff was not privy to, or had any notice, that any part of the money for which the notes were given had been lent for the purpoſe of gaming.

Upon this a queſtion aroſe upon the ſtatute 9 *Ann. c.* 14. § 1. which ſays, "That all notes, where the whole or any part of the "conſideration is money knowingly lent for gaming, ſhall be "void to all intents and purpoſes whatſoever," whether the plaintiff could maintain this action againſt the defendant. And after two arguments the court were of opinion he could not; for it is making it of ſome uſe to the lender, if he can pay his own debts with it: and it will be a means to evade the act, it being ſo very difficult to prove notice on an indorſee. And though it will be ſome inconvenience to an innocent man, yet that will not be a balance to thoſe on the other ſide. And the plaintiff is not without remedy, for he may ſue *Church* on his indorſement. And it is but the common hazard of taking notes of infants or *feme coverts*. As to what *Holt* ſaid in *Huſſey* v. *Jacob*, it was not the point adjudged, and the Chief Juſtice ſaid, he had ſeen a report wherein notice was taken, that all the learned part of the bar wondered at it (1).

Salk. 344. Carth. 356. 5 Mod. 175. Com. Rep. 4. 1 L. Raym. 87. 12 Mod. 96. Holt 328. S. C.

(1) *Vide Lowe* v. *Waller*, *Doug.* 741.

Shuttleworth *verf.* Pilkington.

Bail-bonds need not purfue the words of the return of procefs. Vide Tidd's Prac. K. B. 106, 107. 1 Term Rep. 240.

[1156]

A Special original was taken out returnable *coram Domino Rege ubicunque tunc fuerit in Anglia*, and the bail bond was without the words *ubicunque, &c.* and in an action upon it, it was objected, that by the ftatute of *Hen.* 6. (which was pleaded) the fheriff could take no bond, but fuch as was to appear at the place in the writ mentioned; whereas this might be to compel an appearance out of *England*, if the King fhould happen fo to be. *Sed per curiam*, There are no fet forms of words for thefe bonds, but if in fubftance they are to appear according to the defign of the writ, it is fufficient. 2 *Cro.* 286. 2 *Vent.* 237. 2 *Show.* 51. 2 *Lev.* 180. *Trin.* 3 *Geo.* 2. *Philips* v. *Philips*, *in Saccario*, upon a *quo minus*, the bond was to appear in the office of pleas in the court of Exchequer at *Weftminfter*; and that was held well enough, though the procefs was to appear before the Barons: we will underftand, that by appearing before the King is meant *before the King in his court*, and not before the King in perfon. The plaintiff muft have judgment. *Ante* 153.

T. Jon. 46. Ib. 137. 6 Mod. 122.

Slicer *verf.* Thompfon.

Amendment. Poft. 1182.

THE judgment in *Ireland* was, that the plaintiff *fhall* recover. And upon error here, it was amended to *do* recover, on the authority of *Blakey* v. *Birmingham*, *ante* 1132. (1)

(1) *Vide Short* v. *Coffin*, 5 *Burr.* 2730. *Rees* v. *Morgan*, 3 *Term Rep.* 349.

Between the Parifhes of Kirton *and* Wefton in Nottinghamfhire.

Evidence of fraud is not fufficient in an order. Burr. Sett. Ca. 166. and Sell. Ca. Ed. 1750. vol. 2. p. 189. No. 141. S. C.

UPON a fpecial order of feffions it was ftated, that the *pauper* took a farm of 10 *l. per annum* in *Kirton*, which had been let at that rent for fix years laft paft, but before only at 7 *l. per annum*; and he alfo took a by-tack of 20 *s.* a-year in *Kirton*, and his family lived ten months there: that when he firft took thefe tenements he was not of ability to ftock them; and being told by the former tenant that 10 *l. per annum* was too much, he anfwered, he did not regard the dearnefs, for as it was 10 *l.* a-year it would gain him a fettlement, and put an end to a difpute between two towns; but defired the former tenant, to take no notice of this to any body. The feffions determined this to be

be no ſettlement in *Kirton*. But the order being removed, was quaſhed: for the court ſaid, they could not hold this to be fraudulent, it not being ſo adjudged, and evidence of fraud is not ſufficient (1): and as to the value, they muſt take it to be according to the rent, unleſs the contrary was ſtated; for as it is a removal of a man from his farm, it ſhould be ſhewn to be under value.

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(1) In what inſtances the court may form the concluſion of fraud, although it is not ſpecially ſtated by the ſeſſions in their caſe. *Vide Whaddington* and *Tedford*, *ante* 1014. and the caſes cited in the note.

Heathcote *verſ.* Goſlin. [1157]

THE affidavit to hold to bail was, that the defendant borrowed 2000 *l.* of the plaintiff on bottomree, which money is now due and owing to this deponent by virtue of the ſaid *bond, as thereby may appear*. I objected, that this was no oath of the debt; for ſuppoſe every penny is paid, and a ſeparate receipt taken for it; yet upon the face of the bond the whole will appear due. *Et per curiam*, It is not ſufficient. Then the plaintiff would have made a ſupplemental affidavit (1): but the court refuſed to receive it, for the act of Parliament requires a full oath, previous to the iſſuing the proceſs, that defendants may not be harraſſed. And therefore in this caſe the defendant was diſcharged upon common bail (2).

12 Geo. 2 c. 29. What a proper affidavit to hold to bail.

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(1) *Emerſon* v. *Hawkins*, 1 *Wilſ.* 335. acc. *Et vide Turner* v. *Warren*, *Andr.* 70. But the practice in *C. B.* is contra. *Vide Barnes* 26. 2 *Barnes* 58. 81. 84. 2 *Black.* 850.

(2) *Anon. B. R. Hil.* 19 *Geo.* 2. 1 *Wilſ.* 121. Where affidavit is only by way of reference it is bad. *Rollin* v. *Milis*, upon a bill of exchange S. P. 1 *Wilſ.* 279. *Jennings* v. *Martin*, on an ejectment, S. P. 3 *Burr.* 1447. *Rios* v. *Beliſante*, *poſt.* 1209. On the maſter's allocatur *Powell* v. *Portherch*, 2 *Term Rep.* 55. See alſo *Barclay* v. *Hunt*, 4 *Burr.* 1995. *Warbreck* v. *Wheeler*, *Barnes* 100. *Kelly* v. *Devereux*, *Say.* 59. But in the caſe of perſons ſuing in the right of another perſon it is otherwiſe. *Whitehead* v. *Frankham*, *poſt.* 1219.

Wickes *verf.* Strahan.

A joint commiffion difcharges each partner as to his feparate debts.

THE defendant and his partner in trade had a joint commiffion of bankruptcy taken out againft them, under which they obtained a certificate; the plaintiff was a feparate creditor, and had obtained a judgment before the commiffion or act of bankruptcy: and having now the body of the defendant in execution, the court was moved to difcharge him, upon the authority of *Howard* v. *Poole*, (*ante* 995.) where it was held, that a feparate creditor might come in under a joint commiffion: and alfo on *Abr. Eq. Cafes* 55. 2 *Vern.* 707. 2 *Will. Rep.* 500 (*a*). And the court difcharged him accordingly (1).

(*a*) Mofely 80. S. C.

(1) *Twifs* v. *Maffey*, 1 *Atk.* 67. *Horfey's* cafe, 3 *P. Wms.* 23. In the matter of *Simpfon*, 1 *Atk.* 138.

Cafe of Aberyftwith.

Mandamus. Ante 1003. and the note. Poft. 1180.

IN this cafe, and alfo in the cafe of *Tintagel* about four years ago, the court held, that though it was difclofed that there was a fact of election, yet if upon looking into it there was good reafon to think it void, they would award a *mandamus* upon the act of Parliament, to go to an election, and not wait the event of any controverfy about the former.

Dominus Rex *verf.* Pocock.

What words of a juftice are indictable, and what not.

[1158]

AN information was moved for againft him on account of words fpoken of Mr. *Kent*, a juftice of peace. And the affidavit ftated, that in converfation about a warrant granted by Mr. *Kent*, the defendant afked if Mr. *Kent* was a fworn juftice, and being anfwered to be fure he was, elfe he would not act, the defendant replied, If he is a fworn juftice, he is a rogue and a forefworn rogue.

To this it was objected, that the words were not fpoken *to* him in the execution of his office, but only in relation to what he had formerly done: and *Salk.* 698. was cited. *Et per curiam*, There ought to be no information. It is not the fame infult and contempt, as if fpoken to him in the execution of his office, which would make it a matter indictable (1).

(1) *Vide Rex* v. *Revel*, *ante* 421.

Dominus Rex *verſ.* The Inhabitants of Great Bedwin.

AN order of two juſtices was made, without ſaying it was upon complaint of the churchwardens and overſeers, nor that one of the juſtices was of the *quorum*, nor that the *pauper* (who was a certificate man) was become actually chargeable. Upon appeal to the ſeſſions, they ſet all this right, under 5 *Geo.* 2. *c.* 19. which impowers them to amend defects in form, and proceed to the merits. *Sed per curiam,* This is going too far; they are to amend defects in form, before they go into the merits; whereas here they muſt go into the merits before they can introduce the amendment. It was never deſigned they ſhould inſert new facts, but only amend the informal way of ſetting out the facts which were ſtated. The order therefore for the amendment muſt be quaſhed, and alſo the original order.

Seſſions cannot amend orders by adding new averments. Burr. Sett. 2. 163. Seſſ. Ca. B. 1750. vol. 2. p. 190. No. 142. S. C.

Michaelmas Term

15 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*
Sir Francis Page, *Knt.*
Sir William Chapple, *Knt.* } *Justices.*
Martin Wright, *Esq.*
Sir Dudley Ryder, *Knt. Attorney General.*
Sir John Strange, *Knt. Solicitor General.*

Goodburn *verſ.* Marley.

Horſe races are within the acts againſt gaming. 2 Show. 36. (2)

AN action was brought for 15 *l.* won as a wager at a horſe-race (1). And upon a caſe made and argued, it was determined, that the action would not lie; for 16 *Car.* 2, *c.* 7. has theſe words *horce racing*, and a great many other words, which are not particularly mentioned in 9 *Ann. c.* 14. but are within the general words *other game or games*. And the court ſeemed to be of this opinion in *Oates* v. *Collins*, *Trin.* 6 *Geo.* 2. though it was never determined. *Vide* 1 *Vent.* 253. The defendant had judgment.

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(1) "*The wager was that the mare of one B. beat the defendant's mare.*" MSS.

(2) "*According to a MSS note* "*of this caſe,*" (belonging to a "learned judge now upon the "bench) *it was objected in this caſe* "*that inaſmuch as a late ſtatute* "*was made againſt horſe-racing that* "*is an argument, that horſe-racing* "*was not prohibited by any of the* "*former laws, for if it were, this* "*ſtatute need not have been made*; "*and therefore it was ſaid it could* "*not be within the ſtatute 9 Ann.* "*But to this it was anſwered by the* "*court, that though horſe-racing* "*might not be unlawful, yet betting* "*at horſe-races was ſo; and that the* "*late act of parliament ſpeaks o ly* "*of running of horſes or horſe-racing* "*but ſpeaks nothing of betting at* "*horſe-races, which is the preſent caſe;* "*and therefore that rule can not any* "*ways affect the preſent caſe.*" MSS.

Blaxton v. *Pye*, 2 *Wilſ.* 309. *Johnſon* v. *Bann*, 4 *Term Rep.* 1. acc. See alſo in *Bidmead* v *Gale*, 4 *Burr.* 2432. and in *Good* v. *Elliot*, 3 *Term Rep.* 706. A foot race has alſo been determined to be within the 9 *Ann. c.* 14. upon the principle and authority of this caſe. *Lynall* v. *Longbottom*, 2 *Wilſ.* 36. *Brown* v. *Barkley*, *Cowp.* 281.

Chester *verſ.* Crawley.

THE execution of a writ of inquiry before fourteen jurors was held good: for it is but an inqueſt of office (1), whereon no attaint lies. 2 *Roll. Abr.* 673, 674.

Fourteen jurors on a writ of inquiry good.

(1) S. P. in *Cook* v. *Beal*, 1 *Ld. Raym.* 176. In *Beardmore* v. *Carrington*, 2 *Wilſ.* 248. *Eicborn* v. *Le Maiſtre*, *ib.* 368. *Hewit* v. *Mantell*, *ib.* 374. *Bruce* v. *Rawlings*, 3 *Wilſ.* 62.

Dominus Rex *verſ* Beck. [1160]

UPON an information for perjury in ſwearing a young girl to be of age, in order to obtain a licence; which was ſet out *in hæc verba*: it appeared that the licence when granted was to marry in *Buſhey*, *Watford* or *Aldenham* in *Hertfordſhire*, and then came a blank, which was filled up by the parſon of *Pinner*, who celebrated the marriage, with the name of that pariſh, and as ſuch it was deſcribed in the information.

Adding the name of a pariſh to a licence does not make it void.

Upon the trial at *Guildhall* before *Lee* C. J. he held that this addition did not make it a void licence, for the place is not of the eſſence of a licence; and the practice is to have theſe blanks, and fill them up afterwards. And he compared it to the caſe of a deed altered in a part not material by a ſtranger, which does not vitiate the deed.

Crookſhank *verſ.* Thompſon.

THE defendant gave a bond of indemnity, and before any breach became a bankrupt. And being now ſued, moved to be diſcharged on common bail. But the court compared it to the caſe of *Tully* v. *Sparkes*, (*ante* 867.) and ordered he ſhould give ſpecial bail (1).

Where the breach of a bond is after a bankruptcy, the bond is no diſcharged. Ante 1043.

(1) *Smithſon* v. *Johnſon*, *Barnes* 113. S. P. *Cottrell* v. *Hooke*, *Dougl.* 97. *Alſop* v. *Price*, *ib.* 160. *Young* v. *Hockley*, 2 *Black.* 840. *Vanderheyden* v. *De Paiba*, 3 *Wilſ.* 528. *Ex parte Ardney*, *Cowp.* 460. *Hodkinſon* v. *Woodbridge*, 1 *Doug.* 166. *Talor* v. *Mills*, *ib.* 525. *Utterſon* v. *Vernon*, 3 *Term Rep.* 539. 4 *Term Rep.* 570. And though the ſurety be liable in conſequence of a breach, yet if he has not actually paid it till after the bankruptcy, he cannot prove it under the commiſſion. *Paul* v. *Jones*, 1 *Term Rep.* 599. or unleſs he has been taken in execution, which is conſidered as a ſatisfaction. *Chilton* v. *Whiffin*, 3 *Wilſ.* 13. *Goddard* v. *Vanderheyden*, *ib.* 262.

Hilary Term

15 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt.* *Chief Justice.*

Sir William Chapple, *Knt.*
Martin Wright, *Esq*;
Thomas Denison, *Esq*;
} *Justices.*

Sir Dudley Ryder, *Knt.* *Attorney General.*
Sir John Strange, *Knt.* *Solicitor General.*

Dominus Rex *vers.* Sir Thomas Reynell.

Quo warranto lies for a ferry.

THE court held, that an information in the nature of a *quo warranto* would lie for claiming an exclusive ferry over the *Thames* from *Lalcham* (1): but discharged the rule, because

(1) In *Rex* v. *Nicholson*, *ante* 299. *Rex* v. *Hulston*, *ante* 621. and the cases cited in the note *Rex* v. *Boyles*, *ante* 836. *Rex* v. *Howel*, *Cas. Temp. Hard.* 287. *Rex* v. *Francbard*, *ante* 1149. and *Rex* v. *Jones*, *post.* 1213, the court seems either to have determined or taken it for granted that they can grant an information in nature of a *quo warranto* in the name of the clerk of the crown, at the instance of a private relator for a supposed usurpation of any office or franchise of a public nature. But in *Rex* v. *Marsden*, 3 *Burr.* 1812. all the Judges are rather of a contrary opinion, and declare that there are no traces of the King's coroner and attorney having filed such an information before 4 & 5 *W.* & *M.* *c.* 18. and *Anne*, *c.* 20. *f.* 4. and that such authority is not given by the former, as it was meant not to augment but to check the power of the crown office, and the latter only extends to corporate offices and corporate rights. Vide *Rex* v. *Williams*, 1 *Burr.* 402. 1 *Black. Rep.* 93. S. C. *Rex* v. *Marsden*, *ut supra*. and *Rex* v. *W. Wallis*, 5 *Term Rep.* 375.

it only appeared he took money of paſſengers, which is not ſetting up an excluſive right.

Dominus Rex *verſ.* Jones.

A Plea in abatement was put in to an information in nature of a *quo warranto*, and ſet aſide for want of a title to the affidavit annexed to it: for the practice in the crown-office cannot alter the act of parliament.

Affidavits requiſite to a plea in abatement in the crown-office.

Marſhal *verſ.* Riggs.

[1162]

IN treſpaſs it was moved in arreſt of a judgment, that the declaration was with a *quod cum*; but the plaintiff filing a right bill, the court amended the declaration by it, though for want of thinking of this before many judgments had been arreſted.

Amendment. Ante 1151.

Dominus Rex *verſ.* Cornforth et al'.

THE court granted an information againſt the defendants for taking away a natural daughter under ſixteen, under the care of her putative father: being of opinion, it was within the third ſect. of 4 & 5 *P.* & *M.* *c.* 8.

A baſtard is within the ſtatute of P. & M. 1 Bott. by Conſt. 4c5 pl. 536. S. C. more full.

Between the Pariſhes of Cotleigh *and* Stockland.

AN acre in *Cotleigh*, wherein *A.* had a leaſe for lives, was mortgaged to a *pauper* for 15 *l.* When the mortgagor died, there was two years intereſt due, and he alſo owed 18 *l.* 10 *s.* to the mortgagee by bond and ſimple contract. And it was agreed between the widow and the mortgagee, that he ſhould adminiſter, and take all but the houſhold goods, which he did. And the ſeſſions having held, that his taking to this acre, and living on it eight years, did not gain a ſettlement under 9 *Geo.* 1. *c.* 7. which requires a *bona fide* payment of 30 *l.* The court now quaſhed the order, it being to all intents of law and equity the ſame as actual payment of the conſideration money.

What a purchaſe of 30 *l.* value to make a ſettlement. Burr Sett. Ca. 109. S. C. more full.

Stroud *verſ.* Tilly.

Plaintiff may amend the *venue*.

PER *curiam*, Though a plaintiff cannot regularly move to change the *venue*, yet he may in effect do it by moving to amend. And it was done ſo in this caſe, by ſtriking out *Dorſetſhire*, and inſerting *Middleſex*. (1)

(1) *Rivet et al'* v. *Cholmondley et al. poſt*. 1202. *Hallet* v. *Hallet*, *Wilſ.* 173. *Savary* v. *Serle*, *Say.* 150. *Griffith* v. *Hollier*, *ib.* 294. S. P. So alſo in a *qui tam* action, vide *Bennett* v. *Smith*, 1 *Burr.* 402. But that the plaintiff may move to bring back the *venue* when changed by defendant even after the cauſe had gone down to trial, and need not move to amend, upon which he could only obtain a rule *niſi*. *Vide Bradſhaw* v. *Hopkins*, *Cowp.* 409. But ſee ——— v. *Boddington*, 1 *Cromp. Pract.* 114.

[1163]

Between the Pariſhes of St. Nicholas in Harwich *and* Woolverſtone in Suffolk.

A certificate man may be ſent back though there is a miſtake in the name of the pariſh to which it is addreſſed. Burr. Sett Ca. 171. S. C. more full.

THE *pauper* came into *Harwich* with a certificate from *Woolverſtone*, addreſſed to the pariſh of *Harwich* near *Dover Court*, and delivered it to a pariſhioner, who did not appear to be an officer of the pariſh (1). The ſeſſions were of opinion, he had not taken 10 *l.* *per annum* in *Harwich*, and was therefore not ſettled there: but as there was a miſtake of the name of the pariſh in the addreſs of the certificate, they held *Woolverſtone* could not be obliged to receive the *pauper*. But upon debate it was ruled they were; for it is not to be conſidered as a certificate *to* any particular pariſh, but as a general acknowledgment of his being a pariſhioner of *Woolverſtone*, and is concluſive againſt them for all the world (2): and

(1) The words of the order are, "That the ſaid *Thomas Parſons* "(*the pauper*) went into the pa- "riſh of St. *Nicholas in Harwich* "with the ſaid certificate, and "delivered the ſame unto Mr. *G.* "*D.* an inhabitant of the ſaid "pariſh: but *whether he was a* "*churchwarden or overſeer of the* "*ſaid pariſh did not appear.*"

(2) *Hinton* v. *Saint Mary Axe*, *Salk.* 535. S. P. *et vide Rex* v. *Biſhopſide*, *Burr.* S. C. 384. But *All Saints* v. *Saint Giles*, *Salk.* 530. *Rex* v. *Lulbenham*, 4 *Term Rep.* 251. are contra, *et vide* *Jones* v. *Arundel*, 2 *Black. Rep.* 324. "But although the reaſon of "this determination that a certifi- "cate is not to be conſidered as "one granted to any particular "pariſh," ſeems irreconcilable with theſe deciſions; yet as *H.* was the pariſh which *W.* had in contemplation when it granted the certificate, and as *H.* had regularly received

and the delivery of it to an officer is not neceſſary (3).

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received the pauper, and had neglected to remove him upon the faith of its validity, perhaps the determination may not be conſidered as erroneous notwithſtanding the weakneſs of the reaſons upon which it is built. Vide *Rex* v. *Kirkby Stephen*. *Burr*. S. C. 664. 2 *Bott* by *Conſt*. 799. *pl*. 748. S. C.

(3) But if he keeps it in his own poſſeſſion he ſhall not be conſidered as diſqualified thereby either from gaining a ſettlement in the pariſh to which it is given or from giving one to his apprentice; for the words of 8 & 9 *W*. 3. *c*. 30. are, "ſhall procure bring "*and deliver* to the churchwar-"dens, &c." *Rex* v. *Wenſley*, 5 *Term Rep*. 154. *Nol*. 182. S. C. But ſuch certificate as between the pariſh granting it, and that to which it is directed, will be concluſive evidence of a ſettlement againſt the former up to the time of its date. *Vide Rex* v. *Buckingham*, *Cald*. 64.

Eafter Term

15 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Juftice.*

Sir William Chapple, *Knt.* Martin Wright, *Efq;* Thomas Denifon, *Efq;*	*Juftices.*

Sir Dudley Ryder, *Knt. Attorney General.*
Sir John Strange, *Knt. Solicitor General.*

Bogg *verf.* Rofe.

Practice.

IT was fettled (on confideration) that when a term's notice of trial is required upon an old iffue, the notice muft be given before the effoin-day, and that is a full term (1).

(1) *Harvey* v. *Porter, ante* 211. *contra.* See *Peyton* v. *Burdus. ante* 1100.

Between the Parifhes of Ladock *and* Saint Ennidore.

Serving out the year with an executor in another parifh is a fettlement there. Burr. Sett. Ca. 17[illegible]. S. C. much fuller 19 Vin. Abr. 398. S. C.

A Perfon was hired for a year, and ferved half a year, when the mafter died: the executor (who lived in another parifh) afked the fervant if fhe would ferve out the year with him; fhe did fo: and now on the authority of the cafe of *Ivinghoe*, (*ante* 90.) the court held it a fettlement in the executor's parifh; for the laft fervice is not to be confidered as a new agreement, but a continuation of the firft.

I

Dominus Rex *verf.* Sidney.

UPON removing an indictment from the feffions of *oyer* and *terminer*, the defendant and his bail entered into a 500*l.* recognizance to plead, go to trial, and appear on the return of the verdict. He did fo, and received judgment. And upon motion to difcharge the recognizance, it was infifted he fhould pay cofts: but this not being in 20*l.* the fum required by the ftatute 5 & 6 *W.* & *M.* *c.* 11, the court held it was to be confidered as a recognizance at common law (1). And precedents being fearched, it was found, that cofts had not been required. Here therefore being a performance of every thing the words extended to, the court difcharged the recognizance (2).

Cofts on removals of indictments are not required in a common law recognizance.

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(1) *Regina* v. *Ewer*, *Salk.* 564. (2) *Rex* v. *Fonfeca*, 1 *Burr.* 10. S. P.

Dominus Sex *verf.* The Inhabitants of Sherborne.

A Certificate-man has a fon born in the parifh to which he was certified, who when fixteen years old hires himfelf as a fervant to a button-maker in the fame parifh, and ferves a year. And upon confidering the words of 9 & 10 *W.* 3. *c.* 11. which declare, "That no perfon or perfons who come in by "certificate fhall be adjudged to gain a fettlement by any act "whatfoever, except he takes 10 *l.* *per annum*, or executes an "annual office." The court held, that the fon of the certificate-man was equally within it, and that therefore the hiring and fervice in this cafe gave him no fettlement (1).

The fon of a certificate-man gains no fettlement by a hiring and fervice. Burr. Sett. Ca. 182. more full, and Seff. Ca. vol. 2. p. 385. No. 203. 1 Seff. Ca. p. 322. No. 255. S. C.

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(1) *Rex* v. *Bray*, *Burr.* S. C. 259. 1 *Wilf.* *Rep.* 121. *Rex* v. *Buckingham*, *Burr.* S. C. 314. *Say.* *Rep.* 11. S. P.

Grey *verf.* Jefferfon.

IN a *fcire facias* againft bail, the plaintiff made a miftake in fetting out the recognizance, which the defendant took advantage of by pleading *Nul tiel record*: and afterwards the plaintiff moved to amend it, but was denied; for *fcire facias's* againft bail are never amended, and the courfe is for the plaintiff to quafh his own writ. This may be to defeat the bail of an opportunity to furrender, which he would have done, if he could not have been fure of fucceeding in his plea.

Scire facias againft bail not amendable. Ante 401.

Dominus Rex *verſ.* Fletcher.

If one ſmuggler has no arms he is not within the ſtatute though the others have arms.

THE defendant was indicted on the act 9 *Geo.* 2. *c.* 35. *ſ.* 10. for being armed and aſſiſting in running uncuſtomed goods. Upon trial a ſpecial verdict is found, whereby it appeared that they were above three in company, and all the others had fire-arms, but the defendant had only a common horſe whip. And upon argument the court ſtrongly inclined, that he was not guilty: for the act makes it a material circumſtance in each man's caſe, and theſe acts are to be taken ſtrictly. They did not however determine it upon the firſt argument, but gave Mr. Attorney General time to conſider of it; who upon conference with me declined to argue it, and the priſoner had judgment, and was diſcharged.

Dominus Rex *verſ.* Moravia.

Order of baſtardy. Say. 61. 309, 310. 1 Bott. by Conſt. 437. pl. 596. S. C. more full.

AN order of baſtardy ſtated, that the woman was *delivered of a child baptized in the pariſh of A.* and it was objected that this does not import it to be born there, which is the only circumſtance to warrant the pariſh's applying for relief. But the court ſaid, that by a reaſonable conſtruction it may be ſo underſtood, and confirmed the order.

Trinity Term

* 15 Georgii 2 Regis. In B. R.

* 16. See Burr. Settl. Cas. 187. pl. 66. note to 2d Ed.

Sir William Lee, *Knt. Chief Justice.*

Sir William Chapple, *Knt.*
Martin Wright, *Esq*;
Thomas Denison, *Esq*;
} *Justices.*

Sir Dudley Ryder, *Knt. Attorney General.*

Sir John Strange, *Knt. Solicitor General.*

Dominus Rex *verf.* Taylor.

THE court granted an information againft him as for a nufance, on affidavits of his keeping great quantities of gunpowder, to the endangering the church and houfes where he lived.

Keeping gunpowder in great quantities is a nufance.

Pitts *verf.* Meller et ux'.

IN trover againft both, and judgment and execution againft both: the court refufed to difcharge her out of cuftody, unlefs it could be fhewn that there was fraud and collufion between the plaintiff and the hufband to keep her there (1).

Baron and feme.

(1) *Finch* v. *Duddin*, *poft* 1237. *Langftaffe* v. *Raine*, 1 *Wilf.* 149. *Wilmot* v. *Butler*, *Say.* 149. *Anon.* 3 *Wilf.* 124. *Berryman* v. *Gilbert*, *Barnes* 203. S. P. *Jackfon* v. *Gabree*, 1 *Ventr.* 51. feems *contra.* But if the wife is in cuftody upon mefne procefs, fhe fhall be difcharged out of cuftody upon filing common bail, if her coverture clearly appears. *Lawford* v. *Gardiner*, *Barnes* 96. *Harrifon* v. *Bearcliffe et ux'*, *poft* 1272. *Roberts* v. *Andrews*, 2 *Black.* 720. and the cafes there cited. *Anon.* 3 *Wilf.* 121. *Edwards* v. *Rourke*, 1 *Term Rep.* 486. and fee *Holland* v. *Erfkine*, *Barnes* 100. *Pearfon* v. *Meaden*, 2 *Black. Rep.* 903.

Kent *verſ.* Pocock.

Words of a juſtice actionable.

THESE words ſpoken of a juſtice of peace in the execution of his office, and relating thereto, were held actionable, *viz. Mr.* Kent *is a rogue*, according to the caſe of *Aſton* v. *Blagrave*, (*ante* 617.) 1157.

Beale *verſ.* Moor.

Where full coſts.

IN treſpaſs the defendant juſtified for a way, and the plaintiff replied *extra viam*, and obtained a verdict and damages under 40*s*. But the court allowed full coſts, becauſe this is a caſe where the right came in queſtion (1).

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(1) *Higgins* v. *Jennings*, *ante* 726. S. P.

Between the Pariſhes of Road in Somerſetſhire *and* North Bradley in Wilts.

The court will intend an order late ſerved, where the order on appeal is made at the next ſeſſions but one.
3 Seſſ Ca. p. 280. No. 220. S. C.

A *Pauper* was removed from *Road* to *North Bradley*. *North Bradley* gave notice to appeal, on which *Road* took him back, but however got their order confirmed at ſeſſions. The next ſeſſions ſet both aſide as fraudulent. And now *Road* inſiſted, that the order was good, as not being appealed from at the next quarter ſeſſion. And as to the other, that it was not in the power of one ſeſſion to ſet aſide the act of the other (1). All being now before the court, they quaſhed the firſt order, as being properly quaſhable on appeal; and would not take notice, that it was not at the next ſeſſions after ſervice of the order, which being in the caſe of a recent appeal they would ſuppoſe to have been ſerved too late for an appeal to the next ſeſſions (2). And as to the order of confirmation, they quaſhed that, as not being made on any appeal, and conſequently without juriſdiction (3), and at the ſame time quaſhed the latter part of the ſecond ſeſſions order, that reſcinded that confirmation, as not being properly before them.

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(1) *Vide Rex* v. *Cockfield*, 2 *Salk.* 477. *Rex* v. *Turley*, 1 *Seſſ. Ca.* 175. pl. 215. acc.

(2) *Rex* v. *Newton*, *ante* 831.

(3) 2 *Salk.* 479. S. P.

Between the Pariſhes of Lydlinch *and* Hilton.

THE caſe of *New Windſor* and *White Waltham*, (*a*) *Trin.* 5 *Geo.* 1. turning chiefly on the certificate's being concluſive to the pariſh which gave it, and certified two perſons as man and wife: it now came under debate again, and was determined, that the baſtard of a certificate perſon is ſettled where born, and is not *a* * *child* to be ſent back within the meaning of the ſtatute.

Baſtard of a certificate perſon is ſettled where born.

'Burr. Set. Ca. 187, and Seff. Ca. Ed. 1750. vol. 2. p. 249. No. 170. S. C. (*a*) Ante 186.

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* It was agreed that the word *child* meant *a legitimate child* only. See *Burr. Settl. Caſ.* 190. *Note to 2d Edition.*

Jackſon, qui tam, &c. *verſ.* Giſling. [1169]

IN debt on the ſtatute 15 *Car.* 2. *c.* 8. for ſelling fat lambs alive, the defendant pleaded that in the ſame term another informed againſt him and recovered. And on demurrer it was held ill, according to 2 *Lev.* 141. becauſe he did not ſet out the days on which each bill was exhibited, that ſo the court might judge of the priority (1).

Plea of a recovery in another penal action muſt ſhew the day each bill was exhibited.

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(1) This was a plea in bar, *Vide* 3 *Burr.* 1428. where the preſent note is corrected. Its accuracy however is ſuſtained by *Denniſon* J. *Ib.* 1434. But that there is no diſtinction in this point between a plea in bar and one in abatement, and that in both the particular day muſt be ſet out. *Vide Coombe* v. *Pitt*, 3 *Burr.* 1423. 1 *Black.* 437. S. C.

Davis *verſ.* Miller et ux'.

THESE words, "You cheated the lawyer of his linen, "and ſtood bawd to your daughter, to make it up with "him, you cheat every body, you cheated me of a ſheet, you "cheated Mr. *Saunders*, and I will let him know it:" were held not actionable, without a *colloquium* of the plaintiff's trade or profeſſion (1).

Words not actionable.

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(1) *Vide* 1 *Com. Dig.* Tit. *Action for Defamation.* (F. 7.) 263.

Michaelmas Term

16 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir William Chapple, *Knt.*
Martin Wright, *Esq;*
Thomas Denison, *Esq;* } *Justices.*

Sir Dudley Ryder, *Knt. Attorney General.*

Sir John Strange, *Knt. Solicitor General.*

Ball *vers.* The Hundred of Wymersley in Northamptonshire.

What is a good notice within 8 Geo. 2. c. 16. in an action against the hundred (1). Bull. L. N. P. 185.

UPON a case made at the assizes on the statute of hue and cry, it was stated, that soon after six in the morning the plaintiff was robbed at two miles and an half distance from *Northampton*, and the highwayman cut his bridle and stirrups, threw them into a ditch, and turned his horse loose; that the plaintiff recovered them, remounted, rode through a village called *Cotton*, where he gave no notice, met three men on the road whom he informed of the robbery, and arrived at *Northampton* by seven of the clock, and gave notice to an inn-keeper there, from whence he went to *Rotherthorpe*, three miles off, where the high-constable lived, and between eight and nine gave notice. And whether this was sufficient to maintain the action within 8 *Geo.* 2. *c.* 16. which requires that the party robbed shall "*with as much convenient speed as may be* after the

(1) *Vide Whitworth* v. *The Hundred of Grimshoe*, 2 *Wils.* 105. 4 *Com. Dig.* Hundred (C. 4.) 356.

"robbery

" robbery give notice to one of the conſtables of the hundred, " or to ſome conſtable of ſome town, pariſh, village, hamlet, " or tithing, near unto the place where ſuch robbery ſhall hap- " pen," was the queſtion.

And the court on argument held it to be good notice, for the high conſtable is the propereſt perſon to go to, and it is not required he muſt go to the next conſtable. It appears the plaintiff loſt no time, conſidering the circumſtances he was in; and *Rotherthorpe* is not at ſuch a diſtance, but that it may come within the meaning of the word *near*. So the plaintiff had judgment.

Coy *verſ.* Hymas.

Variance.

THE plaintiff obtained judgment for 388 *l.* 0 *s.* 1 *d.* In debt thereon he deſcribed it as a judgment for 388 *l.* only, omitting the penny: the defendant pleaded *Nul tiel record*: and on iſſue joined inſiſted on the variance. The plaintiff deſired it might ſtand over, and at another day produced the record with a *remittit* of the penny added. The court reſented this as an abuſe of their indulgence, and ſaid they would ſtill conſider it in the ſituation it was in before: or if not, yet the variance was not cured, for a *remittit* muſt be before judgment, whereas this is after. And conſidering it as reducing the firſt judgment, is making an inconſiſtency on the record. The moſt it can amount to is, an acknowledgment of ſatisfaction of ſo much of the money recovered. The defendant had judgment of *deficit de recordo*. Ante 1110.

Holloway *verſ.* Smith.

Toll is not incident to a fair.

IN treſpaſs the defendant juſtifies a diſtreſs for toll, and ſets forth a cuſtom in *Daventry* to hold a fair on *St. Auſtin*'s day and take toll; and that Queen *Elizabeth* reciting all this, had granted them two new fairs, one on the *Tueſday* after *Eaſter*, and the other on Saint *Matthew*'s day, *with all profits, commodities, emoluments, liberties, and free cuſtoms ad hujuſmodi ferias pertinen'*. On demurrer the juſtification was held ill, for toll is not incident of common right (1), and therefore not within the words of reference; and being new fairs, upon which no toll is granted by expreſs words, the cuſtom cannot extend to them. So the plaintiff had judgment.

(1) *Vide Mayor, &c. of Northampton* v. *Ward*, *poſt* 1238.

/ ... 8 Burr 218
12 ... 649. 5 Hare 326

Oates on the Demise of Elizabeth Hatterley *verſ.* Jackſon.

" Deviſe to *A.* for life, and after her death to *B.* and her children of her body begotten or to be begotten by *C.* her huſband, and their heirs for ever" one child being born at the time this creates a jointtenancy between *B.* and her children.
3 Com. Dig. Deviſe (N. 8.) 437. Fearn on Cont. Rem. 4 Ed. 462. 8 Vin. Abr. Deviſe (Y. a.) 239. 5 Term Rep. 324.
15 ... 28
4 ... 399

UPON a caſe made at the aſſiſes, it was ſtated, that *Ralph Clay* being ſeiſed of an eſtate called *Woolfe's Park*, deviſed it in theſe words, " As to *Woolf Park* I give it to my wife *Anna-* " *bella* for her life, and after her death to my daughter *Iſabella* " *Addibell* and her children on her body begotten or to be begotten " by *William Addibell* her huſband, and their heirs for ever." That the wife is dead, and *Iſabella* at the time of making the will had one daughter *Elizabeth*, and afterwards two ſons and one daughter, who are all dead without iſſue: that *Elizabeth* had iſſue the leſſor of the plaintiff: that *Iſabella* ſurvived *William Addibell* and married *Jackſon*, by whom ſhe had a ſon the preſent defendant, who entred on her death.

The queſtion was, what eſtate paſſed to *Iſabella* and her children by *William Addibell*; the plaintiff inſiſting, that *Iſabella* was only tenant for life, and the children of that marriage had the reverſion in fee: the defendant inſiſting, that *Iſabella* was jointly ſeiſed in fee with the children, and having ſurvived them all, and left him her ſon and heir, he is intitled.

And after ſeveral arguments the Chief Juſtice delivered the reſolution of the court: that *Iſabella* took as joint tenant. It being ſtated, that at the time of making the will ſhe had *a child*, which has been conſtrued to be equal to *children*. 2 *Vern.* 106. *Co. Lit.* 9. is expreſs, that to *A. et liberis ſuis* and their heirs, is a joint fee to all. And it is no objection, that by this means the ſeveral eſtates may commence at different times. *Co. Lit.* 188. *Pollexf.* 373. *Mo.* 220.

As *Iſabella* therefore ſurvived all the children ſhe had by *William Addibell*, the whole fee veſted in her, and deſcended to her ſon the defendant. Who had judgment accordingly.

Between the Pariſhes of Nympsfield *and* Woodcheſter in Glouceſterſhire.

An order unappealed from to remove a man and his wife is concluſive as to after-born children. Bur. Settl. Ca. 191.

IN 1731, a man and his wife were removed from *Nympsfield* to *Woodcheſter*, and there was no appeal. They had afterwards returned to *Nympsfield*, and had there three children who were now ſent from *Nympsfield* to *Woodcheſter* together with the father. And upon appeal as to the children, it was offered to give

1 Bott. by Conſt. 402. Pl. 531. S. C.

in

in evidence, that the man had a former wife, and consequently the children born at *Nympsfield* were as bastards settled there. The sessions refused to let *Woodchester* go into this evidence, being of opinion, that *Woodchester* was concluded by the first order unappealed from, and that it made no difference that the children were born afterwards.

The court upon debate confirmed both orders. For the marriage being established by the first order, the settlement of the children (which is derivative) follows of course; and can no way be impeached, but by entering into the merits of the first order, which has been acquiesced in. And nothing is more established, than that an order unappealed from is conclusive. *Salk.* 524, 527. *Carth.* 516. (1)

(1) *Rex* v. *Silchester*, *Burr.* *S. C.* 551. *Rex* v. *Kirkby Stephen*, 2 *Bott by Const*, 799. *pl.* 748. *Rex* v. *Hinksworth*, *Cald.* 42. *Rex* v. *Southowram*, 1 *Term Rep.* 353. *Rex* v. *Kenilworth*, 2 *Term Rep.* 598. S. P.

Between the Parishes of Great Charte *and* Kennington.

A justice cannot join in removing a *pauper* from his own parish. Burr. Sett. Ca. 104. S. C. with another point.

TWO justices of peace made an order of removal, which was quashed at sessions, because one of the justices of the peace was an inhabitant of the parish from whence the *pauper* was removed (1). Upon debate in *B. R.* it was insisted, that 13 & 14 *Car.* 2. *c.* 12. gives the power to any two justices of the peace: and so has been the practice. And the instance of corporations where there are but two justices of the peace, or but one parish, was insisted on. And besides there lay an appeal.

But the court held, that this was a judicial act, and the party interested is tacitly excepted. Lord *Raymond*, who lived in the parish of *Abbotts Langley*, went off the Bench, when one of their

(1) This statement, that the justice was an inhabitant, was thought by the court to be insufficient, and they said that the case ought to be actually amended, in pursuance of which it was stated "that he was charged and chargeable, and paid the poor's rate." *Burr.* *S. C.* 195.

their orders came before the court. They ſaid the practice could not overturn ſo fundamental a rule of juſtice, as that a party intereſted could not be a Judge. And as to the caſe of corporations, they ſaid, that if it appeared there were no other juſtices, it might be allowed to prevent a failure of juſtice. And therefore they confirmed the order of ſeſſions. *Vide* the act 16 *Geo.* 2. *c.* 18. to remedy this. *Salk.* 396, 607.

Stamma *verſ.* Brown.

Where the maſter acts only for the benefit of his owners, it is not barratry though it may be a deviation or breach of contract. Vide Park on Mar. Infur 86. and the caſes collected there. Roſs *v.* Hunter, 4 Term Rep. 33.

THE ſhip the *Gothick Lyon* being advertiſed to be going to *Marſeilles*, goods were ſhipt on board her on behalf of the plaintiff, and a bill of lading ſigned by the maſter, whereby he undertakes to go *a droit route a Marſeilles*, and the defendant underwrote a policy from *Falmouth* (where the goods were taken in) to *Marſeilles*: before the ſhip departed from the port of *London*, another advertiſement was publiſhed for goods to *Genoa*, *Leghorn*,* and *Naples*; and the plaintiff's agent was told, it was intended to go to thoſe ports firſt, and then come back to *Marſeilles*; but he inſiſted that his bargain was to go firſt or directly to *Marſeilles*, and he would not content to let her paſs by *Marſeilles*, or alter his inſurance.

[*1174] The ſhip however did paſs by *Marſeilles*, and after delivering her cargo at the other ports, ſet out on her return for *Marſeilles* with the plaintiff's goods: but in her voyage thither was blown up in an engagement with a *Spaniſh* ſhip. And in an action upon the policy, the breach was aſſigned of a loſs by the barratry of the maſter. And the plaintiff inſiſted, that any fraud or malverſation of the maſter was within the meaning of the word *barratry*. *Dufreſne* terms it *dolus qui ſit in contractibus*; and ſo do all the dictionaries, as *Florio's Italian Dict. verbo barrataria*; *Minſheu*, *Fletcher*, &c. And that in the caſes of *Knight* v. *Cambridge*, and *Knight* v. *Dodd*, *Paſ.* 10 *Geo.* 1. where the loſs was laid to be *per fraudem* of the maſter, the court held it a good aſſignment of a breach, there being the word barratry in the policy. Ante 581.

The defendant's counſel inſiſted, this was no more than a deviation, in which caſe the inſurer is diſcharged, and the plaintiff's remedy is againſt the owners or maſter. That this cannot be called a crime in the maſter, when he is acting all the while for the benefit of his owners,

The Chief Juſtice in his direction to the jury told them, that this being againſt the expreſs agreement to go firſt to *Marſeilles*, ſeemed

feemed to be more than a common deviation; being a formed defign to deceive the contractor. And compared it to the cafe of failing out of port without paying duties, whereby the fhip was fubjected to forfeiture, and which has been held to be barratry.

The jury ftaid out fome time, and upon their return afked the Chief Juftice, whether if the mafter was to have no benefit to himfelf by paffing by *Marfeilles*, and went only to the other places firft for the benefit of his owners, that would be a barratry? And the Chief Juftice anfwering, No, they found for the defendant.

And now a new trial being moved for, the cafe was argued; and all the court was of opinion, that the verdict was right. For the mafter has acted confiftent with his duty to his owners, and the plaintiff's agent knew of the intended alteration, before the goods were put on board, and might have refufed to fhip them, or have altered the infurance; that to make it barratry there muft be fomething of a criminal nature, as well as a breach [1175] of contract; and that here the breach being affigned only on the barratry, was not fupported by the evidence. So the defendant had judgment.

Barker *verf.* Suretees.

Or rejected in the conftruction of a will. MSS. S. C.

ON a fpecial verdict in ejectment, the queftion turned upon thefe words in a will, *viz.* I give the faid premiffes to my grandfon, his heirs and affigns, but in cafe he dies before he attains the age of twenty-one years *or* marriage, *and* without iffue, then and in fuch cafe he devifed the fame to the defendant. The fact was, that the grandfon attained twenty-one, and died having never been married. And it was infifted, that the attaining twenty-one was a performance of the condition, and vefted the eftate abfolutely in the grandfon, under whom the leffor of the plaintiff claimed. And judgment was accordingly given in the county palatine of *Durham*, whereof error was brought *in Banco Regis*.

And after feveral arguments, the court affirmed the judgment, upon the authority of *Price* v. *Hunt* in *Pollexf.* 645. where the word *or* was conftrued conjunctively. And they faid they would read this without the word *or*, as if it run, "And if he "dies before twenty-one, unmarried and without iffue;" which he did not do, for one of the circumftances failed. And all put together are but in the nature of one contingency: and it was

was confiderable, that this was not a condition precedent, but to deftroy an eftate devifed by the former words in fee (1).

The cafes relied on *e contra* were 2 *Vern.* 388. *Cro. Car.* 154. Sir *W. Jones* 205. 1 *Roll. Abr.* 835. *pl.* 4.

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(1) *Frammingham* v. *Brand*, 1 *Wilf.* 140. 3 *Atk.* 390. S. C. and the opinion of *Pratt* C. J. in *Right* v. *Hammond*, *ante* 429. S. P. *Collinfon* v. *Wright*, 1 *Sid.* 148. 1 *Eq. Ca. Abr.* 188. *pl.* 8. *Sewell* v. *Garret*, *Moor* 422. So alfo in the furrender of a copyhold, *Wright* v. *Kemp*, 1 *Term Rep.* 47. But where the devife was to truftees and their heirs to receive the rents till *B.* fhould attain 21, *or* have iffue; and if *B.* fhould attain 21, *or* have iffue, then to *B. and the heirs of his body*. But if *B.* fhould happen to die before 21, *and* without iffue, remainder over. *B.* attained his age of 21, and died without iffue. Lord *Hardwicke* confidered the word *and* as ufed for *or*, and decreed the remainder over to take place. But he faid it would be otherwife if the firft demife had been to *B. and his heirs*. *Brownfword* v. *Edwards*, 2 *Vef.* 240. *Fearn Cont. Rem.* 3 *ed.* 399.

Eaft-India Company *verf.* Chitty.

At what time a goldfmith's note muft be demanded.

AT half an hour after eleven in the morning of 18 *January*, the defendant being indebted to the plaintiffs, paid to their cafhier a note of *Cafwell* and *Mount*, goldfmiths in *Lombard-ftreet*; they continued to pay all notes till the next day at two; and immediately after they had ftopt payment, the company's fervant came with the note. The queftion was, who fhould bear the lofs? And upon examining merchants, it was held, that the company had made it their own, by not fending it out the afternoon of the 18th, or at furtheft the next morning. So there was a verdict for the defendant (1).

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(1) It was formerly the practice to leave the reafonablenefs of the time in which payment was to be demanded to the jury as being a queftion within their province, *Vide Hankey* v. *Trotman*, 1 *Black. Rep.* 507. But as this was productive of endlefs uncertainty, it is now confidered as a queftion of law arifing out of the fact, *Metcalfe* v. *Hall*, *K. B. Tr.* 22 *Geo.* 3. *Bull. L. N. P.* 275. *Appleton* v. *Sweetapple*, *B. R. M.* 23 *Geo.* 3. *Bayley on Bills*, 73. *Tindal* v. *Brown*, 1 *Term Rep.* 107. and it feems alfo eftablifhed that the next day after a banker's draft is given, is the ftated time allowed by law for the demanding payment, in order to exonerate the holder from the confequences of the drawer's infolvency.

Memorandum. *Having received a considerable addition to my fortune, and some degree of ease and retirement being judged proper for my health; I this term resigned my offices of Solicitor General, King's Counsel, and Recorder of the city of* London, *and left off my practice at the House of Lords, Council Table, Delegates, and all the courts in* Westminster-hall *except the* King's Bench, *and there also at the afternoon sittings. His Majesty, when at a private audience I took leave of him, expressed himself with the greatest goodness towards me, and honoured me with his patent to take place for life next to his Attorney General.* Anno ætatis meæ 47.

Hilary Term

16 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt.* *Chief Justice.*

Sir William Chapple, *Knt.*
Martin Wright, *Esq*; } *Justices.*
Thomas Denison, *Esq*;

Sir Dudley Ryder, *Knt.* *Attorney General.*
The Hon. William Murray, *Solicitor General.*

Tomlin *vers.* Purlis.

An apt issue may be joined, though there is not an exact affirmative and negative.
1 Wils. 6. S. C.

DEBT was brought in an inferior court at *Rochester* upon a bond. The defendant pleaded duress of imprisonment. To which the plaintiff replied, that he was at large, and at his own disposal, and executed the bond of his free will, and not for fear of imprisonment: and concludes to the country. To this there was a demurrer, and judgment given for the plaintiff.

It was now objected on error, that it is not said, he was *extra quamlibet prisonam*, which is the ancient way of pleading: and that at least the replication should have concluded with an averment.

Sed per curiam, This is such an affirmative as implies a negative; like the case of pleading in a writ of right, where the demandant counts, that he has more right than the tenant, and the plea of the tenant is, that he hath more right than the demandant. The ancient rule of requiring an affirmative and negative has been long broke into, as in the common case of in-

 fancy,

fancy, where formerly they not only replied full age, but alſo traverſed the infancy, which is not now required. Sir *Tho. Jones* 6. It is enough, if the ſecond affirmative is ſo contrary to the firſt, that the firſt cannot in any degree be true (1). So the judgment was affirmed.

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(1) *Co. Lit.* 126. *Sav.* 86. *Kit.* 214. *b.*

Harriſon *verſ.* Grundy.

THE court held, that on 9 & 10 *W.* 3. *c.* 15. they could not receive any complaint to ſet aſide an award, till the ſubmiſſion was made a rule of court: and that a conſent in the ſubmiſſion bond, to make the *award* a rule of court, inſtead of the *ſubmiſſion*, would not warrant their interpoſing. When awards are to be complained of. 1 Com. Dig. Arbitrament. (D.) 534.

Paterſon *verſ.* Taſh. At Guildhall.

IT was held by C. J. *Lee*, that though a factor has power to ſell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a ſecurity for his own debt, though there is the formality of a bill of parcels and a receipt. And the jury found accordingly. Factor cannot pawn (1).

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(1) Not even to the amount of his lien for a general balance. *Per Buller & Groſe* J. *hæſitante Lord Kenyon* C. J. *Daubigny* v. *Duval*, 5 *Term Rep.* 606.

Mynot *verſ.* Bridge et al'.

TWO declarations were delivered at the ſuit of the ſame plaintiff againſt the ſame defendants, one of them for a right of way from one part of a cloſe to one part of a town, and the other was for another way from another part of the cloſe to another part of the town: and the court refuſed to conſolidate them, becauſe the plaintiff may be ready as to one, and not as to the other: and in the caſe two years ſince of *Smith* v. *Crabb*, for the ſame reaſon the court refuſed to conſolidate ſeveral declarations in ejectment. Where the court will not oblige conſolidating of declarations (1) Ante 1149.

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(1) *Vide Cecil* v. *Briggs*, 2 *Term Rep.* 639.

Serecold *verſ.* Hamſon, Bart.

THE defendant was outlawed in a perſonal action, without any affidavit made of the plaintiff's demand: and having brought error, he aſſigned his being beyond ſea at the time of the outlawry, for which the court made no difficulty to Where ſpecial bail is required on reverſing outlawry. 1 Wilſ. 3. S. C.

reverse it. But then the question was, upon what terms they should do it, the plaintiff insisting on special bail, and having
[1179] now made a proper affidavit; and the defendant insisting to file common bail only.

The court upon considering the words of 4 & 5 *W. & M.* *c.* 18. § 3. which empowers the outlaw to appear by attorney (as he did here) and says, "It shall be reversed without bail in all "cases, but where special bail shall be ordered by the court," declared they were of opinion, they had a discretionary power to require it or not; and that the want of an affidavit before, was no objection, because that is only requisite to warrant an arrest; and here was one in time, for the new action that must be brought. And though the 31 *Eliz. c.* 3. § 3. is the only act that expressly requires bail; it is not to be inferred from thence, that in other cases it ought not to be insisted on; for that act makes a new error, and the bail upon it is absolutely to pay the condemnation money (1).

Tidd's Pract. K. B. 65. Lit. Rep. 301. Salk. 496. Carth. 459. Cases in King William's time 549. Gilb. H. C. P. 19.

(1) *Vide Ducket* v. *Martin, ante* 951. See the cases cited *Tidd's Pract. K. B.* 71, 72.

Martin, on the demise of John Tregonwell, Esq. *vers.* Strachan et al.'

Tenant in tail with the reversion in fee *ex parte materna* suffers a common recovery, the old use is gone, and it descends to his right heir. 1 Wils. 2, 66. 4 Bro. P. C. 486. and a very full note of the judgment of Lee, C. J. 5 Term Rep. 107.

IN ejectment for lands in the county of *Dorset*, a special verdict was found, whereon the short state of the case was this: tenant in tail *ex parte materna* (1), with the reversion in fee in himself

(1) *Vide MSS. note of* C. J. "*Lee's opinion whereby it appears* "*that this report is very defective.* "*John Tregonwell being seized in* "*fee, on the marriage of his daughter Mary with Francis Luttrell,* "*settled his estate (after several pre-* "*cedent estates for life), To the* "*use of the first and other sons of* "*the marriage in tail male, with re-* "*mainder over, reversion in fee to* "*himself. There was issue of this* "*marriage a son and two daughters;* "*the son died without issue an infant,* "*Mary survived Francis Luttrell,* "*and married Sir J. Banks, by* "*whom she had issue two sons, John* "*and Jacob; John died without* "*issue; Jacob entered and suffered* "*a common recovery and died with-* "*out issue and intestate*" *B. F.*

"*The tenant in tail in this case* "*who suffered the recovery took his* "*estate tail by purchase under the* "*settlement (that is he was the first* "*person who took under the limita-* "*tion) had he taken the estate tail* "*by descent, it would after the reco-* "*very have gone to the heirs of the* "*first purchaser of the tail.*" *MSS.* Vide Abbot *v.* Burton, Salk. 59. cited supra Roe ex dem, Crow *v.* Baldwere, 5 Term Rep. 104.

himſelf on the part of the mother alſo, ſuffers a common recovery to the uſe of himſelf in fee. And whether this fee on his death veſted in his heir on the part of the father, or of the mother, was the queſtion.

And after two arguments at bar, the Chief Juſtice delivered the reſolution of the court: that by the common recovery to the uſe of himſelf in fee, the title under the ſettlement was deſtroyed, and a new fee acquired, deſcendible to the right heir of him that ſuffered the recovery. He ſaid, it was true, that if *A.* ſo ſeiſed, had made a feoffment to the uſe of his own right heirs, it would work no alteration, but be the ſame uſe, according to *Co. Lit.* 13. 3 *Lev.* 406. *Salk.* 590. But that is only in the caſe of a deſcent; whereas here the eſtate-tail he took, was as a purchaſer *per formam doni.* In the caſe of a common recovery the recoveror has a fee as the grantee of tenant in tail, *Poph.* 5. and a full fee paſſes. The caſe of *Simmonds* v. *Cudmore*, *Salk.* 338. was upon the operation of a fine, which differs widely from that of a recovery. The charges of tenant in tail affect the fee gained (*Poph.* 7.) but no act or charge of the remainder man ſubſiſts, which ſhews nothing of his eſtate paſſes. 1 *Co. Capel's* caſe (2). The leſſor of the plaintiff therefore, claiming only as heir

(2) This caſe is very briefly and confuſedly ſtated; the reaſoning as I have collected it from the other reports of the caſe is as follows: If tenant in tail by purchaſe with the reverſion in fee *ex parte materna*, levies a fine, &c. the land ſhall deſcend to his maternal heirs, *vide Simmonds* v. *Cudmore*, *Salk.* 338. 1 *Show.* 370. but if he ſuffers a recovery of the lands, as is the caſe here, it ſhall go to his paternal. The ground of the difference is this: The fine deſtroys the eſtate tail as much as if the tenant in tail had died without iſſue. The abſolute fee therefore which the conuſor had in reverſion, becomes thereby veſted in poſſeſſion; beſides which a baſe fee paſſes to him alſo by the fine. But this being the weaker eſtate, it merges in the former. The tenant is therefore ſeiſed of a fee which coming *ex parte maternâ* muſt deſcend in the ſame line. But a recovery is a ſpecies of conveyance excepted out of the ſtatute *de donis*, *Benſon* v. *Hudſon*, 2 *Lev.* 26. When it is uſed, the tenant in tail may paſs the fee, as he might have done a conditional fee after iſſue born prior to that ſtatute, by any other ſpecies of conveyance. A recovery therefore paſſes a full and abſolute fee ſimple, which is totally independent of the reverſion, ſince a rent charge created by him in reverſion would be deſtroyed by the recovery. *Poph.* 6. *Vide* alſo 1 *Rep.* 6. n. *a.* 2 *Rep.* 53. As the uſe of a fee then paſſes out of the tenant in tail to the recoveror, it reſults back to the former where no uſe has been declared, and the eſtate which he thus has is a fee ſimple, unconnected with

heir on the part of the mother, there was judgment for the defendants.

Affirmed in the House of Lords, by the unanimous opinion of all the other Judges (3).

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with the reversion. It does not therefore partake of its descendible quality, but having vested in the conusor by purchase, must descend to his heir at law. The rule laid down here extends to copyhold as well as freehold lands. *Roe ex dem Crow* v. *Baldwere*, 5 *Term Rep.* 104. and that there is no difference in this respect between them in case of a devise, *per Pratt* C. J. *ante* 491. In what cases a devise to an heir shall change the course of descent, and in what not, *vide Smith* v. *Trigg*, *ante* 491. and the note *Allan* v. *Heber*, and the cases cited in it, *post*. 1270. So also where the legal and equitable interests descend in different lines, the latter merges in the former, and descends with it. *Goodright* v. *Wells et al'*. *Dougl.* 770.

(3) This case in 1 *Wils.* 66. seems to be a report of it in the House of Lords, for the special verdict is stated to have been found upon a trial at bar in *B. R.* And *Willes*, then Ld. C. J. of *C. B.* delivers the judgment which seems to have been given about the same time that the judgment of *B. R.* was affirmed in *Dom. Proc.* *Vide* 4 *Bro. P. C.* 485.

The Case of the Corporation of Scarborough.

Mandamus.

A *Mandamus* was moved for on 11 *Geo.* 1. *c.* 4. § 2. to go to the election of bailiffs, coroners, chamberlains, and the other annual officers of the corporation; there not having been any good officers since the year 1736, and those that have been in fact chosen, several of them had judgments of *ouster* against them. And upon considering the cases of *Tintagel* and *Aberystwith*, (*ante* 1003, 1157.) court granted a *mandamus*: here being no reasonable expectation of justifying the rights of the present possessors, and the act being made to prevent the confusion in corporations, that must ensue. And they said it should go not only for the head officer, but also for the others who were necessary constituent parts of the corporation, and equally within the reason of the statute (1).

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(1) *Vide Rex* v. *Woodrow*, 2 *Term Rep.* 732.

Howarth *verf.* Willett.

A Declaration upon a policy was laid in *Lancafhire*, and delivered here 8 *February*. I moved on an affidavit that it was figned at *Briftol*, and that the common affidavit to change the *venue* was fent for, that we might have time. And the court inclined to have relieved us, if it had not appeared to arife in *Briftol*, where there is no *Lent* affizes (1); and they could not order it to an adjacent county, without confent of both fides, though the defendant offered his confent to avoid delay (1). *Venue.*

(1) *Southboufe* v. *Boak*, *poft.* 1216. *Nichols* v. *Bolfter*, cited 1 *Wilf.* 138.

Morres, Baronet, *verf.* Barry.

ERROR of a judgment in ejectment for lands in *Ireland*, where there are two demifes laid of the fame premiffes for the fame term both as to commencement and duration; and the judgment is, that the plaintiff recover his *terms* (in the plural number) in the premiffes.

The court will make any poffible intendment to fupport a judgment in ejectment. 1 Wilf. 1. S. C.

It was objected, that both leffors could not have a title to demife the whole; and therefore there was an inconfiftency in the judgment, and *non conftat* which of the leffor's rights is eftablifhed. [1181]

Sed per curiam, As this is after a verdict, a bare poffibility of title confiftent with the judgment will be fufficient. The two leffors might be jointenants, and yet refufe to join in a leafe; and having an intereft in every part of the land, it was not improper for each to demife the whole. The judgment does not intitle the plaintiff to hold one moment longer, than he ought to do if it had been *term* in the fingular number. So the judgment was affirmed.

Ante 908. Ante 835.

Herbert *verf.* Griffiths.

TO debt on bond for performance of covenants, the defendant pleaded *Nil debet*, to which there was a demurrer and joinder in demurrer. And upon the defendant's confenting to put the plaintiff into as good a condition as if he had pleaded right at firft, the court permitted him to waive his firft plea, and plead performance of covenants (1).

Plea waived after a joinder in demurrer. 1 Cromp. Pract. 170.

(1) *Vide Jeffrys* v. *Walter*, 1 *Black.* 357. *Mead* v. *Philips*, *ante Wilf.* 177. *Olding* v. *Arundel*, 1 906, and the cafes there cited.

Dominus Rex *verſ.* Thomas Sergiſon, Eſquire.

Information. 2 Hawk. P. C. ch. 26. ſ. 9. 7 ed. 4 vol. 90.

AN information was moved for againſt him for not condemning a horſe taken out of a team under the ſtatute 5 *Geo.* 1. *c.* 12. which requires proof to be made before a juſtice, of the cauſe of forfeiture; and the party who ſeized tendering his own oath, the defendant ſcrupled to take it (1), or determine the affair, in the abſence of the owner or driver. *Et per curiam*, They were both reaſonable objections. Why is not the perſon who ſeized, and is to have the benefit of the forfeiture, within the reaſon of excluding informers where there is a penalty? *Making proof* muſt mean *legal proof.* The other alſo is but natural juſtice. There are exceptions in the act as to one ſtone, or one piece of timber, though drawn by ever ſo many horſes; and ought not the owner to have an opportunity of ſhewing it? The rule was diſcharged with coſts.

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(1) *Rex* v. *Moore, caſ. temp. Andr.* 18. S. P. *Vide Rex* v. *Hardw.* 176. *Rex* v. *Piercy, Jtily, ante* 316. and the note.

[1182]

Between the Pariſhes of Atherton *and* Barton.

Agreement to part on a month's notice does not reduce it under a hiring for a year. Ante 950. Burr. Set. Ca. 203. S. C.

A Perſon ſettled in *Atherton* hires himſelf into *Barton* for one year, at 4 *l.* wages, and either maſter or ſervant to be at liberty to determine the contract at the end of any quarter, upon a month's notice. And it is ſtated, that he ſerved the year out, but that at the time of the hiring the *pauper* declared, he made the agreement in that manner, to prevent loſing his former ſettlement. And upon this caſe the two juſtices and ſeſſions held it no ſettlement in *Barton.*

But the court on debate quaſhed both the orders; for this is the common ſort of hiring for a year, with an intention to ſtay together (as in fact they did); and if this ſhould be determined not to gain a ſettlement, it would overturn great numbers of ſettlements that ſubſiſt on ſuch hirings.

Hillerſdon *verſ.* Skildroy.

Amendment after error brought.

AFTER error in the Exchequer Chamber, the court amended the judgment, by adding the introductory words to the awarding a writ of inquiry, *viz. That the plaintiff ought to recover*

recover his damages against the defendant. For this is but a consequence of determining that the replication which the defendant demurred to was good. *Vide ante* 1132. *Blakey* v. *Birmingham*, and *Slicer* v. *Thompson*, *ante* 1156.

Scrimshire *vers.* Alderton. At Guildhall.

Where goods are sold by a factor who has agreed to take the risk of the debts, the vendee is answerable for the amount to the owner, if he has received notice from him to pay him and not the factor, previous to his having paid the latter. (1).

THE plaintiff, who was a farmer in the isle of *Ely*, sent up oats to *Bear-key*, consigned to one *Hunt* as his factor. The custom of the trade appeared to be, that formerly the factor had 4 *d.* *per* quarter for selling them, and they gave immediate notice to the farmer of the name of the buyer, and the price: but this being inconvenient to farmers at a distance, it had for many years past been customary for the farmer to allow 2 *d.* *per* quarter more, upon the factor's taking the risque of the debts: since which they had ceased to inform the farmers of the buyers. The goods in the present case were sold; but the factor failing, the plaintiff (before actual payment) gave notice to the defendant (the buyer) not to pay the factor, which he did notwithstanding: and thereupon this action was brought.

[1183]

The Chief Justice was of opinion, that this new method had not deprived the farmer of his remedy against the buyer, provided there was no payment to the factor. And the only reason of advancing 2 *d.* *per* quarter was, to have both at stake: and here being notice before actual payment, there could be no harm done. And therefore he directed the jury in favour of the plaintiff. They went out and found for the defendant; were sent out a second, and a third time to re-consider it, and still adhered to their verdict; and being asked man by man, they separately declared they found for the defendant. Upon this a new trial was moved for, and no cause being shewn was accordingly granted. And at the sittings after this term it came on again before a special jury; when the Chief Justice declared, that a factor's sale does by the general rule of law create a contract between the owner and buyer. But notwithstanding this, the jury found for the defendant; and being asked their reason,

(1) Mr. J. *Buller*, in his *Law of Nisi Prius*, p. 130. seems to be of opinion with the jury, that the particular circumstances of this case discharged the operation of the general rule of law, "that the sale of the factor creates a contract between the owner and the buyer," for that from the agreement to take the risque of the debts upon him, the factor himself was to be considered as the debtor to the owner.

declared, that they thought from the circumftances no credit was given as between the owner and buyer, and that the latter was anfwerable to the factor only, and he only to the owner.

Seaman *verf.* Fonereau. At Guildhall.

If a material circumftance of danger is concealed from an infurer, the policy is void, although the lofs does not happen by its intervention (1).

ON 25th *Auguft* 1740, the defendant under-wrote a policy from *Carolina* to *Holland*. It appeared the agent for the plaintiff had on 23d *Auguft* received a letter from *Cowes* dated 21ft *Auguft*, wherein it is faid, "The 12th of this month, I "was in company with the fhip *Davy*, (the fhip in queftion) at "twelve in the night loft fight of her all at once; the captain "fpoke to me the day before that he was leaky, and the next day "we had a hard gale." The fhip however continued her voyage till 19th *Auguft*, when fhe was taken by the *Spaniards*: and there was no pretence of any knowledge of the actual lofs at the time of the infurance, but it was made in confequence of a letter received that day from the plaintiff abroad, dated 27th *June* before.

Several brokers were examined, and proved that the agent ought to have difclofed the letter; for either the defendant would not have under-wrote, or infifted on a higher premium. And the Chief Juftice was of that opinion, and declared, that as thefe are contracts upon chance, each party ought to know all the circumftances. And he thought it not material, that the lofs was not fuch an one as the letter imported; for thofe things are to be confidered in the fituation of them at the time of the contract, and not to be judged of by fubfequent events; he therefore thought it a ftrong cafe for the defendant, and the jury found accordingly.

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(1) *Vide* the feveral cafes collected upon this fubject, *Park on Mar. Infur.* 179.

Eaſter Term

16 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Juſtice.*

Sir William Chapple, *Knt.*
Martin Wright, *Eſq;*
Thomas Deniſon, *Eſq;*
} *Juſtices.*

Sir Dudley Ryder, *Knt. Attorney General.*
The Hon. William Murray, *Solicitor General.*

Middleton *verſ.* Price.

IN treſpaſs and falſe impriſonment againſt the plaintiff in the action and the officer, they jointly juſtified under a proceſs of the court at *Welch Pool*, returnable at the next court. And it not being ſhewn, that any return was made, the court held, that the officer (1) was a treſpaſſer *ab initio*, and that the plaintiff by joining with him in the plea, is equally affected by the defect of it. And therefore there was judgment againſt them both.

A juſtificati n under a retu na- ble proceſs i ill without ſhewing a return of t, and if the pl in- tiff join with the officer ther muſt be judgmen: againſt both. 1 Wilſ. 17. .C. Ante 993.

(1) But a bailiff or other ſubordinate officer need not ſhew that the writ was returned, becauſe it is not in his power, as he is only to execute the ſheriff's warrant. *Britton* v. *Cole*, *Salk.* 409. *B. L. N. P.* 23.

Dominus Rex *verf.* Monkhoufe.

No replevin of goods taken upon a conviction.

THE court granted an attachment againft the under-fheriff of *Cumberland*, for granting a replevin of goods diftrained on a conviction for deer-ftealing (1).

(1) *Vide Rex* v. *Burchet*, *ante* 567. *note*. "The fheriff was advifed and had exprefs notice before he granted the replevin, that the goods were irreplevifable: and the ground of the decifion was, that the conviction was conclufive, and its legality could not be queftioned in a replevin." MSS. 196.

[1185]

Lewis, on the Demife of the Earl of Derby, *verf.* Witham.

A recovery without feifin is imperfectly found, and no *venire facias de novo* fhall go. 1 Wilf. 48, 55. More full 4 Bro. Par. Ca. 504. S. C.

UPON a fpecial verdict in ejectment, the defendant claimed under a common recovery, whereby it was infifted the leffor of the plaintiff was barred. But exception being taken, that no writ of feifin or execution is found, the court was of opinion the defendant could not take any advantage of the recovery. It was then moved, that a *venire facias de novo* might go, this being an old recovery an hundred years ago, on which execution would be prefumed; and in fact there was a writ of feifin and a return, and fo this recovery is compleatly found in a caufe now depending on the demife of the Duke of *Athol*: it was likewife infifted, that the minutes find this recovery *prout*, *&c.* and therefore warrant the inferting this.

Sed per curiam, A *venire facias de novo* can only be granted upon what appears to the court on this record; and unlefs the record warrants it, it will be error to grant it. 8 *Co. Leveday's* cafe. It is not the verdict, but the defendant's title that is imperfect: how can we fuggeft, that the jury have mifbehaved themfelves; and yet that muft be an introduction of a *venire facias de novo*.

It was then prayed, that an entry might be made of its being afked and denied: but as to that, the court faid, that as it was to iffue upon the record, it would be grantable by the court where error was brought: as was done in the Houfe of Lords lately in the cafe of the wine licence office. *Ante* 1125.

Ante 1053.

Affirmed in the Houfe of Lords upon the queftions put to the Judges in both refpects (1).

(1) This has always been confidered as a ftrange cafe, a writ of feifin never being in fact executed. *Per Lord Kenyon* C J. in *Goodright ex dem. Burton* v. *Rigby*, 5 *Term Rep.* 179.

Dewey *verſ.* Sopp.

The defendant is not bound by a conſent to rejoin *gratis*, if the replication affords cauſe of demurrer.

THE defendant obtained time to plead, on the terms of pleading an iſſuable plea, rejoining *gratis*, and taking ſhort notice of trial. The action was on a bond, conditioned to ſurrender a copyhold at the requeſt and coſts of the plaintiff; and the plea was, that the plaintiff never requeſted: the plaintiff replied a requeſt, and made up the iſſue with a rejoinder to the country; which the defendant ſtruck out, and demurred, ſo near to the aſſizes, that the plaintiff expecting a trial, had the record made up, and actually tried the cauſe before he heard of the demurrer. And now upon motion, the court ſet aſide the [1186] verdict: for the conſtruction of theſe terms put upon defendants, when they aſk time to plead, is not to oblige them in all events to join iſſue to the country; but only where the replication offers a fair iſſue, and affords no reaſonable cauſe of demurrer (1). Now here the replication not ſhewing any tender of a ſurrender, does give ſuch a colour of objection, as will warrant what the defendant hath done.

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(1) That a fair demurrer is an iſſuable plea within a judge's order, *vide Stonehouſe* v. *Powell*, *Say.* 88. *Gray* v. *Aſhton*, 4 *Burr.* 1788. *in B. R. Wright* v. *Ruſſell*, 2 *Black. Rep.* 923. *S. P. in C. B. Niſbet* v. *Farmer*, *Barnes* 168. *contra in C. B.* and *Sutton* v. *Wadlilove*, *ib.* 314. *vid. acc.* but it does not appear there whether the demurrer was frivolous.

Soreſby *verſ.* Sparrow.

Oyer of a deed not to be diſpenſed with though ſhewn to be loſt. 1 Wilſ 16. 3 Term Rep. 153. S. C.

THE plaintiff declared in covenant, making a *profert* of the counterpart executed by the defendant, and aſſigned the breach in non-payment of rent. The defendant demanded *oyer*: and upon ſearch the plaintiff could not find it, and upon affidavits of his inability to give *oyer*, applied to the court to diſpenſe with it, the defendant having the original leaſe, and therefore not inconvenienced. But the court on conſideration declared they could not do it; the plaintiff was bound to make a *profert*, elſe his declaration would be demurred to; the defendant is by law intitled to *oyer*, and the denial of it would be error. They ſaid this does not depend upon any particular rule of the court, but on the general right of law, which the court cannot diſpenſe with. 1 *Mod.* 266. It was the plaintiff's fault to bring the action, before he had the deed, or a proper diſcovery. And it is not like the caſe of a defendant

whose deed is in the plaintiff's hands, where the court will grant imparlances from time to time until it is produced (1).

(1) *Vide* Doctor *Leyfield*'s case, 10 *Rep*. 93. *a*. *Snelgrove* v. *Bailey*, 3 *Atk*. 214. *per Hardwicke* C. But it is now held that the proper method of pleading this deed would have been "that it was lost by time and accident," and without a *profert*, *Read* v. *Brookman*, 3 *Term Rep*. 151. But where the party has made a *profert* and lost the deed, he may move that the production of a copy shall be *oyer*, or if he have none, to amend his declaration and plead as above. *Ib*. *Totty* v. *Nesbitt*, *ib*. 153. *n*. 1 *Cromp*. *Pract*. 141. *Matison* v. *Atkinson*, 3 *T*. *R*. 153. *n*. And see the case of *Whitfield* v. *Fausset*, 1 *Vez*. 392.

Smith *verſ.* Nicholson.

Plaintiff cannot call for the return of a *capias ad satisfaciendum* pending error. 1 Wils. 16. S. C.

Ante 867.

THE plaintiff in order to proceed against bail took out a *capias ad satisfaciendum* on the 3d of *December*, on the 4th a writ of error was allowed, notwithstanding which he called for a return of *non est inventus*; and then waiting till the writ of error was at an end, proceeded by *scire facias* against the bail. And now upon motion the whole proceedings were set aside; for the ground of them, *viz*. the return of *non est inventus*, was obtained after notice of the writ of error, which in its nature stopt all sort of proceedings, and the sheriff could not so much as look after the defendant in order to ground such a return upon (1).

(1) *Vide Perkins* v. *Woolaston*, *Salk*. 321. 6 *Mod*. 130. 2 *Ld*. *Raym*. 1260. *S*. *C*.

[1187]

Sir John Hartop *verſ.* Alderman Hoare et al'.

There can be no market overt for pawning, and the court cannot take notice of the custom of *London* as to shops (1). 1 Wils. 8, 9. 3 Atk. 44. 4 Vin. Abr. tit. Bailment, 9. S. C.

IN trover for jewels, the jury found this special verdict. That the plaintiff being owner of the jewels, lodged them in the hands of *Seamer* a goldsmith for safe custody only, inclosed in a paper sealed up, and that also inclosed in a bag sealed up with the plaintiff's seal, and took a receipt from him for the same. That *Seamer* broke the seals, and carried the jewels to the de-

(1) *Marsden* v. *Panshall*, 1 *Vern*. 407. *Hoare* v. *Parker*, 2 *Term Rep*. 376. See *Demainbray* v. *Metcalfe*, 2 *Vern*. 691. *Ib*. 698. which seems *contra*.

fendant's

fendant's open shop in *Fleet-street*, where they traded in jewels, and often lent money on the security of jewels, and there borrowed of them 300*l.* and deposited the jewels as his own, by way of security, at the same time giving his note for the money. That *Seamer* had no authority from the plaintiff to sell, order, pawn, or dispose of the jewels, and that the defendants have converted them to their own use.

This cause was twice solemnly argued at the bar, the first time by serjeant *Prime* and Mr. *Mildmay*, and the second time by myself and Mr. *Bootle*. And this term the Chief Justice delivered the resolution of the court as follows.

The general question in this case is, whether the property found to be originally in the plaintiff is divested by any act found to have been done in this case. In order to consider this, it will be proper to see 1. How *Seamer* stands with regard to the plaintiff, and 2. With regard to the defendants.

1. As to the plaintiff, he is a mere bailee for safe custody only, without any authority to open the bag the jewels were in; and he was a trespasser in so doing. 4 *Co.* 23. *Mo.* 248. *Co. Lit.* 89. *a.*

2. As to the defendants, though they came honestly by them, yet they are within the general rule of *caveat emptor*, unless something appears particularly to exempt them. What they rely upon is, that they are purchasers of them in a market overt, it being found that they bought them in an open shop, where they dealt in jewels, which according to the custom of *London* is a markét overt for that purpose.

To this it was properly answered by the plaintiff, that this custom not being found, the court cannot judicially take notice of it; and in all cases these customs are pleaded or found. For this purpose was cited the case of *Argyle* v. *Hunt*, *Trin.* 5 *Geo.* 1. (*ante* 187.) where a prohibition was moved for after sentence, because it appeared in the libel, that the word *whore* was spoken in *London*; but denied, for though the words appear to be spoken there, yet the custom does not appear: and though (said the court) we have such a private knowledge of it, that upon motions we do not put the party to produce an affidavit of it; yet we cannot judicially take notice of it. And agreeable to this is 5 *Mod.* 162. *Carth.* 75. *Salk.* 125. 243. *Mo.* 360. *Co. Lit.* 175. *b.* *Cro. Car.* 517. *Cro. Jac.* 69. [1188]

Another,

Another, and we think also a proper answer, was likewise given, that if we could take notice of the custom, yet that extends only to the case of a sale, and not of a pawn. *Perk.* § 435. *Noy.* 28. 2 *Sid.* 139. *Lamb.* 619. 35 *H.* 6. 25. *Jenk. Cent.* 83.

It is a rule that all customs must be taken strictly and not extended to similar cases. 1 *Roll. Abr.* 567, 568. *Show.* 4. *Owen* 4. 2 *Leo.* 109. 208. 1 *Bulst.* 207. 2 *Roll. Abr.* 85. *pl.* 7. 2 *Inst.* 713. but here a pawn is not a similar case; sales in market overt are encouraged, because it is a circulation of property, whereas pawning is *pro tempore* a locking of it up.

There is no occasion to pray in aid of 1 *Jac.* 1. *c.* 21. in this case; though it was not immaterially argued from for the plaintiff. We are all of opinion, the plaintiff must have judgment.

Trinity Term

*16 Georgii 2. Regis. In B. R.

* 16 & 17. See Burr. Sett. Ca. 220. pl. 75. 1 Wilf. Rep. 18.

Sir William Lee, *Knt. Chief Juftice.*

Sir William Chapple, *Knt.*
Martin Wright, *Efq;*
Thomas Denifon, *Efq;*
} *Juftices.*

Sir Dudley Ryder, *Knt. Attorney General.*

The Hon. William Murray, *Solicitor General.*

Taylor *verf.* Hall.

THE court held, that it was not actionable to fay, the plaintiff *had* had the pox. For it is avoiding him for fear of contagion, and refufing to keep him company, that is the legal notion of damage; and when he is cured, thofe inconveniences will not attend him. And judgment was arrefted (1).

Not actionable to fay *A.* has had the pox. Roll. Abr. 48.

(1) *Vide* in *Carflake* v. *Mapledoram*, S. P. acc. 2 *Term Rep.* 473.

Dominus Rex *verf.* Eyre, Clerk.

A Writ *de excommunicato capiendo* iffued out of Chancery, which was opened and inrolled in *B. R.* but upon exceptions taken to it, the court made a rule upon the profecutor

Where the writ of *excommunicato capiendo* has been opened and inrolled in *B. R.* and the delivery of it to the fheriff is ftaid by the defendant until the return is out, chancery may iffue a fecond. It is good where it ftates the caufe "to be on an appeal and complaint of nullity." So though the Judge is made a party, and condemned in cofts. Vide 4 Com. Dig. Excommengement, (B. 1.) 106. (B. 4.) 109.

to

to ſhew cauſe why the delivery out of the writ to the ſheriff ſhould not be ſtaid: before an opportunity came of ſhewing cauſe, the return of the writ was out: and the proſecutor ſued
[1190] out a ſecoud writ *e Cancellaria*, and to prevent the loſs of that, deſired that the defendant might at once take his exceptions by a motion to quaſh.

The firſt exception was, that the former writ being inrolled in *B. R.* the Chancery could not iſſue a ſecond writ, but by 5 *Eliz. c.* 23. ſuch ſecond writ was to iſſue from *B. R.* To this it was anſwered, that the act related only to the caſe where the firſt writ had actually iſſued, and the ſheriff had returned *non eſt inventus*; where the court can fine him if they ſee occaſion, and iſſue *capias*, *alias*, and *pluries*. *Et per curiam*, The anſwer is right; if the firſt writ had been actually quaſhed, they muſt have gone to the Chancery for another.

Second exception, That it is ſaid to be on an appeal and complaint of nullity: now from a nullity there lies no appeal. Anſwer,
Ante 422. 871. This is their form, which *Trin.* 3 *Geo.* 1. *Rex* v. *Elderton*, it was held we muſt have regard to; they lay words with an *aut conſimilia*, which is allowed.

Third exception, The Judge is made a party and is condemned in coſts. *Mo.* 540. 1 *Vent.* 86. Anſwer, In this caſe there could be no other, he *ex officio* excommunicates a man; that man appeals, and muſt make ſome body a party; there is no promoter, and therefore he cites the Judge: the ſuperior juriſdiction is of opinion, he has done the man an injury, and why then ſhould he not pay coſts? Lord *Talbot* in his time, and Lord *Hardwicke* ſince, upon exceptions to the *ſignificavit* held, it was proper to make him a party, and that he was liable to coſts.

The court (after time taken to conſider) diſcharged the rule for quaſhing, and ordered it to be inrolled, and delivered out to the ſheriff.

Thrale *verſ.* Vaughan.

On what bonds there ſhall be bail in error.
1 Wilſ. 19. S. C.
Ante 476. 959.

THE condition of a bond was, that if the plaintiff furniſhed a third perſon's cellar with beer, the defendant would pay, not exceeding 100 *l.* The defendant pleaded, that none was delivered: to which the plaintiff replied a delivery to the value of 80 *l.* and the defendant demurred. And judgment was given for the plaintiff.

Of

Of this judgment error was brought; and bail not being put in, execution was taken out. And now upon confideration of 3 *Jac.* 1. *c.* 8. where the words are, *Bonds for the payment of money only*, the court fet afide the execution: for this is by no means a certain demand, but refts upon a *quantum meruit*; and the fum is only put into the replication, in order to affign a breach. And the act being to reftrain a legal remedy, muft be taken ftrictly (1). 1 *Keb.* 613. *Carth.* 28. 2 *Bulft.* 54. 1 *Lev.* 117. [1191]

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(1) That this ftat. 3 *Jac.* *c.* 8. is to be conftrued liberally. *Vide Huddy et ux'* v. *Gifford*, *Com*, *Rep.* 321. *Chauvet* v. *Alfray*, 2 *Burr.* 746.

Pitts *verf.* Carpenter.

A fet-off reducing the demand under 40 s. does not affect the jurifdiction. 1 Wilf. 19. S. C.

ON a trial at *Guildhall* the plaintiff proved 4 *l.* 15 *s.* 3 *d.* to be due to him: the defendant by a fet-off difcharged 3 *l.* 2 *s.* fo the verdict was only for 1 *l.* 13 *s.* 3 *d.* The defendant upon this moved on 3 *Jac.* 1. *c.* 15. and fuggefted both to be citizens of *London*, and prayed to be excufed, and have cofts: and relied on the cafe of *Hickman* v. *Colley*, *ante* 1120.

But the court held, he was not intitled to the benefit of that act, though the damages were under 40 *s.* for it is plain the real demand was above 40 *s.* and how could the plaintiff tell, whether the defendant would fet off any thing in that action, fo as to be bound to chufe that jurifdiction. Befides, he has in effect recovered 4 *l.* 15 *s.* 3 *d.* becaufe a debt, which he muft otherwife have paid, is now fatisfied. Here are two caufes determined, both of them of greater value than is within the inferior jurifdiction. The plaintiff had judgment for the 1 *l.* 13 *s.* 3 *d.* and his cofts (1).

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(1) *Grofs* v. *Fifher*, 3 *Wilf.* 48. S. P. in *C. B.* adm. *Fitzpatrick* v. *Pickering*, 2 *Wilf.* 68. *Benfon* v. *Hemming*, *Barnes* 353. Otherwife where no fet-off, if the demand is reduced below 40 *s.* *Ante* 1120, &c.

Yeo *and* Leman.

The tenant fhall not deduct land-tax to the improved value in account with his landlord.

EJECTMENT being brought on a re-entry for non-payment of rent, the defendant moved to ftay the proceedings, on payment of arrears and cofts. In the account before the

the master a difficulty arose about the proportion of land-tax to be allowed, as to which the case was: that the premisses were let at 120 *l. per annum*, but by improvements were of more value; and since those improvements, were taxed at 150 *l. per annum*. The tenant would have deducted the whole land-tax. But the court held, that the landlord ought only to allow the proportion which 120 *l.* bears to 150 *l.* upon the whole.

Olivant *verf.* Perineau.

No bringing goods into court in trover.
1 Wils. 23. S.C.
Ante 821.

[1192]

IN trover for pictures, the court refused to let the defendant bring them into court. For the action is not for the thing, but damages; and they may not now be in as good a condition as they were before. *Salk.* 597. A case of *Blackborne* v. *Freeman* was cited, where a rule was taken for bringing in a watch-chain; but in fact the court said the motion was denied (1).

(1) *Buxton* v. *Gabell*, *B. R.* 1 *Wils.* 33. *Harding* v. *Wilkins*, *Say.* 120. *B. R.* S. P. *Sed vide* *Juncy* v. *Clerk*, *Cas. of Prac. C. B.* 69. *Cook* v. *Holgate*, *ib.* 130. *Prac. Reg.* 260. in *C. B.* *Cattling* v. *Bowling*, *Say.* 80. *Fisher* v. *Price*, 3 *Burr.* 1364. in *B. R.* *contra*. In which last it is laid down that goods may be brought into court in trover. When it is brought for a specific chattel of an ascertained quantity and quality, and the case is unattended with any circumstances that can enhance the damages over the real worth, but that its real and ascertained value must be the sole measure of the damages. *Ib.* 1364. But the plaintiff may still elect to proceed for special damages at the peril of costs. *Ib.* 1365. *Whitters* v. *Fuller* in *C. B.* *Black. Rep.* 902. *Vide Anon, ante* 131. and the cases there cited.

Long *verf.* Miller.

Practice as to pleas in abatement.
1 Wils. 23. S.C.

WHEN the rules to plead ran for eight days, the course of the court was to allow the four first only for pleas in abatement: but as to pleas in chief, it was sufficient if they came in at any time before judgment signed. In *Trin.* 6 *Geo.* 2. the time for pleading was shortened to four days, but no provision for any distinction between the two sorts of pleas. In the present case the rule was given the 7th of *May*, which expired the 11th: and (no judgment being signed) the defendant on the 16th put in a plea in abatement; notwithstanding which the plaintiff signed his judgment. And *per curiam*, He had a right so to do. Whilst the eight days rule stood, the plaintiff was not obliged to regard a plea in abatement, that did not come in within

within the four days; but might sign his judgment, as if there was no plea at all. *Style's Pr. Reg.* 369. 1 *Lill.* 2. Now when we shortened the general time of pleading, can it be imagined we intended to enlarge it as to dilatories? They still stand upon the strict rule of the court, and must come in within the four days, and cannot be received after, as pleas in chief may (1). Cases in Holt's time 524.

(1) *Vide Anderson* v. *Baddisflade, post.* 1268. *Biddleton* v. *Atcherley,* S. P. in *C. B. Co. Ca. Prac.* 63. and the four days are both inclusive. *Jennings & al'* v. *Webb,* 1 *Term Rep.* 277. and the cases there cited, and *Sunday* is counted as one, unless it be the fourth day, when it may be filed on the fifth. *Lee* v. *Carleton,* 3 *Term Rep.* 642. *Harbord* v. *Perigal,* 5 *Term Rep.* 210. S. P.

Catlin *vers.* Catlin.

IT was held, that upon a proper affidavit the writ may be marked for bail in trover, without the order of the court, or of a Judge at his chambers; for it is more an action of property, than a tort. 6 *Mod.* 14. *Trin.* 11 *Geo.* 2. *Pitts* v. *Meller in B. R.* (1). Special bail in trover without a Judge's order. 1 Wilf. 23. S. C.

(1) Adm. *Lumley* v. *Quarre,* 2 *Ld. Raym.* 767. *Emerson* v. *Hawkins,* 1 *Wilf.* 335. *Chater* v. *Jaques, Cowp.* 529.

Case of the Lecturer of St. Anne's Westminster.

THE court (upon consideration) refused to grant a *mandamus* to the bishop of *London* to grant licence to a lecturer, who appeared to have no fixed salary, but to depend altogether on voluntary contributions; and where there was no custom, and the rector had refused his leave to preach in the church to the person now applying (1). *Vide Cases in Holt's time* 433. No *mandamus* for a lecturer. 1 Wilf. 11. S. C. much fuller.

(1) *Vide Rex* v. *Bishop of London,* 1 *Term Rep.* 331. *Rex* v. *Field, &c.* 4 *Term Rep.* 125.

Dominus Rex *vers.* Grosvenor. [1193]

HE was one of the dissenters who was chosen sheriff of *London* and *Middlesex,* and refused to take upon him the office: for which an information was moved for against him, as No information for refusing the office of sheriff. 1 Wilf. 18. S. C.

it is an office in which the publick are interefted, and therefore not to be compenfated by a pecuniary fatisfaction to the city. But upon fhewing caufe, the court difcharged the rule, it appearing there were acts of common-council that had provided penalties upon refufers, which is the proper remedy; efpecially where it is *in dubio*, whether the refufal is a crime or not, which has never yet been fettled. In this cafe the facts are agreed, and the only doubt is in point of law (1); and therefore more proper for a civil fuit: and fo was the opinion of the court in the cafe of *Shakleton* of *York* (a) in Lord *Hardwicke*'s time. However they declared, that if after the point was determined againft the diffenters, others fhould refufe; it might be a foundation to afk for an information.

(a) Rep. Andr. 201. n. * but not S. P.

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(1) *Vide Guildford Town* v. *Clarke*, 2 *Vent*. 247. *Larwood*'s cafe, 1 *Ld. Raym*. 29. 4 *Mod*. 269. and it has been determined that diffenters are not eligible by law to ferve the office of fheriff, and therefore are not liable to a fine impofed by a bye-law of the corporation in cafe of refufal. *Harrifon Chamberlain of London* v. *Evans*, 2 *Burn's Eccl. Law* 157. 6 *Bro. P. C.* 181. *Cowp*. 536.

Between the Parifhes of Deddington *and* Dunfrew.

A certificate-man gains a fettlement by purchafe. Burr. Sett. Ca. 220. S. C.

A Certificate-man purchafed a houfe for 42*l.* lived in it many years, then fold it, and becoming chargeable was fent back. It was infifted, that 9 & 10 *W.* 3. *c.* 11. faying, " A certificate-man fhall gain a fettlement by no act whatfoever, " unlefs the taking 10*l. per annum*, or ferving an annual " office;" this man, notwithftanding the purchafe, might be fent back: and it was faid to differ from the cafe of *Burclear* v. *Eaftwoodhay*, *Pafch*. 5 *Geo*. 1. where the furrender of a copyhold to the certificate-man's wife was held to gain him a fettlement; becaufe there it was not his own act, (as this purchafe is) but it came to him by operation of law. The court did not think this a fufficient diftinction, and faid a purchafe was in its nature an excepted cafe; and his felling it afterwards made no alteration, as was held *Trin*. 12 *Geo*. 2. between *Saint Neots* and *Saint Cleer* (1).

Ante 163.

Ante 1116.

This alfo, as to a purchafe by a certificate-man, was held the laft term in the cafe of the parifh of *Stansfield*. *Burr. Rep. S. C.* 205. 1 *Seff. Ca*. 396. No. 316.

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(1) *Rex* v. *Weft Stofford*, *Burr. S. C.* 307. *Rex* v. *Wivelingham*, *Doug*. 738. accord.

Barclay *verf.* Earle.

Effoin lies not on a *capias* to arreft, and plaintiff may go on notwithftanding an irregular *non prof.* is figned.

THE defendant being fued by original, and arrefted upon a fpecial *capias*, caft an effoin with the clerk; and for want of the plaintiff's adjourning it, figned a *non prof.* The plaintiff took no notice of this, but delivered his declaration, and after the rule to plead was out, and a plea called for, figned his judgment.

This was moved to be fet afide, though little could be faid to fupport the legality of cafting an effoin on the fpecial *capias*, where the fheriff is not to fummon, but arreft the party (1). But what was principally relied on was, that after a *non prof.* figned, the plaintiff was out of court, as to all purpofes but moving to fet it afide, and therefore could not fign his judgment, but was irregular in that refpect. But the court (confidering it as a trick) declared, that as there was no colour for the effoin, or to expect a plaintiff to fearch after a *non prof.* and there was no notice given of it; the plaintiff was right to go on: and therefore they refufed to fet afide the judgment.

(1) It is now fettled that there can be no effoin in a perfonal action. *Argent* v. *Dean and Chapter of St. Paul's*, E. 23 *Geo.* 3. *Sellon's Prac.* 7. *Symonds* v. *Mayor of Totnefs*, *Co. Caf. Prac.* 8. *Anfon* v. *Jefferfon*, 2 *Wilf.* 164 *contra.* But in proceedings againft peers and members of parliament where the procefs is by fummons and diftrefs, it is ftill allowed. *Rooke* v. *Earl of Leicefter*, 2 *Term Rep.* 16.

Goddard *verf.* Cox. In Middlefex.

Who has the power of applying payments. (1) Ante 24. and Bull. L. N. P. 174.

SAMUEL *Owen* was indebted to the plaintiff for coals. He died, and made his wife executrix. She continued to deal with the plaintiff, and received coals on her own account; then fhe married the defendant, who alfo received coals on his own account, and made feveral payments generally upon account. Thefe payments, if applied to the debt from the executrix, and her debt whilft a widow, cleared both thofe accounts, and the prefent action was againft the defendant only, for what was delivered in his time. And the queftion was, who had the right

(1) In *Hawkins* v. *Rawlins*, *ante* 24. *Anon. Cro. Eliz.* 68. *Anon.* 8 *Mod.* 236. S. P. *Bull. L. N. P.* 174. *Gilb. Law of Evid.* 3 ed. 177. 16 *Vin. Abr.* 277.

of applying thefe payments, there being no direction from the defendant, who it was agreed had the firft right. And the Chief Juftice held, that thereby it devolved to the plaintiff. And the defendant being by the marriage equally a debtor for what his wife received *dum fola*, as for what was after; the plaintiff might apply the money received to difcharge the wife's own debt: but as to the demand againft her as executrix, the validity of which depended on the queftion of affets, and manner of adminiftring them; he was of opinion, the plaintiff could not apply any of the money paid by the defendant to the difcharge of that demand.

A cafe was mentioned to have been before the Chief Juftice at *Suffolk* affizes in 1730, between *Blofs* and *Cutting*, where the defendant owed money on two bonds, and paid money on ac-
[1195] count, but gave no directions which he would have it applied to; and upon a cafe referved, it was determined, that the plaintiff had the election.

Bifhop *verf.* Chitty. At Guildhall.

An acceptance to pay at a goldfmith's muft be tendered within the fame time that a note muft.

CASE by indorfee of a bill of exchange againft defendant as acceptor, who on tender of the bill wrote, "Meffieurs *Cafwall* and *Mount*, pay this bill when due for *Thomas Chitty*." The bill fell due 2 *January* 1741, the bankers paid till the 19th at two, and 21ft *January* the money was demanded of defendant.

For the defendant it was infifted, that the plaintiff had given fuch a credit to the bankers, as to make it his lofs; and they compared it to the common cafe of a note or draft kept.

For the plaintiff it was faid, that there was no limited time, but that of the ftatute of limitations, to fue the acceptor; and that the plaintiff cannot come in as a creditor of the goldfmiths, becaufe they have done nothing to make themfelves liable.

The Chief Juftice held, that it was the lofs of the plaintiff, who though he might have refufed to take fuch an acceptance, yet had now agreed to it: and it was to all purpofes in the nature of a draft, which is always confidered as actual payment, when a reafonable time to receive it in is elapfed (1).

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(1) *Smith* v. *De la Fontane*, *B. R. T.* 25 *Geo.* 3. *Bayley on Bills Append.* No. 5. *vide contra.*

Michaelmas Term

17 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir William Chapple, *Knt.*
Martin Wright, *Esq;*
Thomas Denison, *Esq;*
} *Justices.*

Sir Dudley Ryder, *Knt. Attorney General.*
The Hon. William Murray, *Solicitor General.*

Dominus Rex *verf.* Dawbeny.

TWO fets of churchwardens were fworn in for the parifh of *Sampford Peverel* in *Devon*; and the court refufed to grant any information in the nature of a *quo warranto*, but left them to fettle the right in an action (1).

No *quo warranto* for office of churchwarden. 1 Bott by Conft 288. pl. 326. S. C. more full.

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(1) *Rex* v. *Shepherd*, 4 *Term Rep.* 381. S. P. upon the authority of this cafe.

Graham *verf.* Benton.

ON a motion to difcharge the defendant out of execution, as being a bankrupt, on the ftatute 5 *Geo.* 2. *c.* 30. it appeared that the debt was contracted before the bankruptcy, and fued for and recovered pending the commiffion, and before any certificate obtained, and the judgment was afterwards affirmed on error, and cofts given on fuch affirmance.

Bankrupt. 1 Wilf. 41. S. C. MSS. S. C.

And the court discharged him as to all; for not having his certificate, he could not plead to the action: and these costs were attendant upon the original judgment; and cannot be considered as given for delay of execution, when it appears there ought to have been no execution, though no writ of error had been brought (1).

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(1) *Palmby* v. *Masters*, *Barnes* 368. *Calcraft* v. *Swann*, *ib*. 204. *Aylett* v. *Harford*, 2 *Black*. 1317. *Blandford* & *al'* v. *Foote*, *Cowp*. 138. *Lewes* v. *Piercy*, *H. Black. Rep*. 29. *Langford* v. *Ellis*, *Cook's Bank. Laws* 232. 3d ed. But a bankrupt executor pleading a false plea *after the commission issued*, is liable to execution for the costs. For the debt arises from his pleading the false plea, and is therefore subsequent to the commission. *Howard* v. *Jemmet*, 3 *Burr*. 1378. 1 *Black*. 400. S. C. The 5 *Geo*. 2. *c*. 30. extends only to the person, not to executions against the bankrupt's goods. *Callen* v. *Meyrick*, 1 *Term Rep*. 361.

Newcombe *vers*. Green.

Postea amended by the Judge's notes.
1 Wils. 33. S. C.

IN covenant the breach was assigned in non-payment of 270*l*. mortgage-money. And on the trial the jury gave a verdict for 274*l*. 11*l*. damages: and Mr. Justice *Burnet* entered it so in his minutes, but the clerk of *nisi prius* had only marked 1*s*. damages on the *distringas*.

The court was now moved, to alter the indorsement, by making it agreeable to the Judge's notes. And Mr. Justice *Denison* having conferred with him, and reporting the matter to be as above stated, the court ordered it to be amended accordingly (1).

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(1) *Vide Eddowes* v. *Hopkins*, *Doug*. 361. *Aple* v. *Grant*, *ib*. 703. *Taylor* v. *Whitehead*, *ib*. 718. *Eliot* v. *Skyp*, *Cro. Car*. 338. *Bola's* case, *Salk*. 53. *Mayo* v. *Archer*, *ante* 513. *Bois* v. *Bois*, 1 *Lev*. 134. *Doe* v. *Perkins*, 3 *Term Rep*. 749. *Williams* v. *Jones*, *Barnes* 6. *Hankey qui tam* v. *Smith*, *ib*. 449.

Dyson *vers*. Ironmonger et Ux'.

Where a party is ordered to attend the court, the court permitted counsel to examine him, but would not swear him.

ON a complaint against one *Stanton*, for serving a writ, where the plaintiff had disowned employing any body: a rule was made upon *Stanton*, to answer the matters in the affidavits, and at the same time attend the court in person. Upon his attendance, and reading his affidavit, I desired leave to ask him

ſome queſtions on behalf of the defendants, which the court allowed me to do; but would not ſwear him to anſwer ſuch queſtions.

Everall *verſ.* Smalley.

Cuſtom to bar intails of copyholds by recovery or ſurrender good (1) 1 Wilſ. 26. S. C.

IN ejectment, a caſe was ſtated, that by the cuſtom of the manor of *Collingham* a tenant in tail of a copyhold might ſurrender the ſame, and bar his iſſue, without ſuffering a recovery; and that by the ſame cuſtom a recovery might be ſuffered in the manor court, and have the ſame effect. The leſſor of the plaintiff in this caſe claimed under a bare ſurrender: and it was objected, that the cuſtom to bar by ſurrender could only be ſupported *ex neceſſitate*, where there was no other way; whereas here it could be done by recovery, and therefore no neceſſity appeared. *Sed per curiam*, There is no caſe to warrant any ſuch diſtinction, and there is nothing unreaſonable in allowing two ways of alienating eſtates; the cuſtoms are both of equal antiquity, and we cannot prefer one to the other. The ſurrender [1198] is the moſt natural way, and the cheapeſt. The *poſtea* muſt be delivered to the plaintiff.

(1) *Doe* v. *Truby*, 2 *Black. Rep.* 944. S. P.

Mitford, Executor, *verſ.* Cordwell.

Audita querela muſt be brought, where the caſe is doubtful.

THE plaintiff's teſtator obtained judgment, which after his death was revived by two *ſcire facias's* with *nichils* returned (1); and the defendant being taken in execution, moved to be diſcharged, upon producing a releaſe from the teſtator, and a rule was made for the plaintiff to ſhew cauſe.

Upon ſhewing cauſe it appeared very doubtful, whether the releaſe was executed by the teſtator: and thereupon I inſiſted, that though when the *ſcire facias* is not ſerved, the court will in a clear caſe relieve the party upon motion (2); and not put him to bring his *audita querela*: yet they will never do it, where the

(1) But if the ſheriff had returned a *ſcire feci*, the releaſe being from the teſtator, he could not have had an *audita querela*. 1 *Cooke* v. *Berry*, 1 *Wilſ.* 98. *Vide* 2 *Cromp. Prac.* 439. 1 *Com. Dig. Audita Querela*, (C.) 649.

(2) *Wharton* v. *Richardſon*, *ante* 1075.

fact is disputed. And so the court agreed, but then they would have had the plaintiff consent to try it in a feigned issue, the defendant lying actually in execution; which the plaintiff, who was an executrix in trust, refusing to consent to, the court refused to do any thing upon the motion, and left the defendant to his *audidita querela*.

White *vers.* The Earl of Montgomery.

Where a bond is in the hands of a third person, the court will oblige him to give *oyer* and produce it.

IN debt upon bond the defendant craved *oyer*, which the plaintiff was not able to give him, the bond being in the hands of Mr. *Strickland*, a gentleman of the bar, who had refused to produce it, and enable the plaintiff to force the defendant to plead. And the court being moved against Mr. *Strickland*, his excuse was, that the bond was left with him to wait the event of a suit still depending. *Et per curiam*, That is a matter the defendant may avail himself of by plea, and we will not determine it upon motion: there must be a rule on Mr. *Strickland* to give *oyer* of the bond (1), and produce it at the trial, if required by the plaintiff.

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(1) Like rule where the deed was tortiously in the hands of the defendant. *Mattison* v. *Atkinson*, *E*. 27 *Geo*. 3 *B*. *R*. 3 *Term Rep*. 153.

Dominus Rex *vers.* The Inhabitants of Madley in Staffordshire.

Costs are not to be paid where any material part of an order is quashed. Burr. S. C. 202. But not S. P. S. C.

A Man, his wife and daughter were removed by order of two justices of the peace, which upon appeal was confirmed, and being removed by *certiorari* into the King's Bench, was there quashed as to the daughter, her age not being stated, nor the place adjudged to be the place of her settlement; but as to the man and his wife the orders were confirmed.

[1199]

(*a*) Rep. Burr. S. C. 194. but no such determination.

It then became a question upon the statute 5 *Geo*. 2. *c*. 19. § 2. whether costs should be paid. And a case was cited of the inhabitants of *Great Chart*, (*a*) *Mich*. 16 *Geo*. 2. where the court affirmed the order of sessions as to the point of the appeal, but quashed a reservation in the same order as to costs in case of a new removal; and it was determined, that the prosecutor of the *certiorari* should pay costs.

Sed per curiam, That is a very different case from this, for there the party could not be affected by the part of the order

 which

which was quaſhed, till the ſeſſions had made an actual order about the coſts; and the bringing it up for the purpoſe of quaſhing that part was unneceſſary, and conſequently vexatious, which is the true teſt to go by. Whereas here the pariſh who brought the *certiorari* were unjuſtly burthened with the daughter, and had no other remedy but to come here. And the Parliament never intended to puniſh them for taking a legal remedy againſt a *gravamen*. Upon writs of error there are no coſts, if execution was taken out before. In this caſe therefore the recognizance given on bringing the *certiorari* muſt be diſcharged (1).

(1) *Rex* v. *Hitcham*, *Burr. S. C.* 504. *Rex* v. *Bray*, *ib.* 687. acc. So where a caſe is ſent down by *B. R.* to be re-ſtated, and the proſecutor upon ſuch re-ſtatement finds the ground of his appeal done away, and abandons it, his recognizance for the coſts ſhall be diſcharged. But if he litigates the amended caſe, and the deciſion is againſt him, it ſhall not. *Rex* v. *Edgeworth*, 4 *Term Rep.* 218.

Between the Pariſhes of Wingham *and* Sellindge in Kent.

A certificate-man muſt be ſworn into an office elſe he gains no ſettlement by executing it. Burr. Sett. Ca. 223. more perfect. S. C.

IT was ſtated in a ſpecial order, that a certificate-man, having notice that he was appointed borſholder, never took the oath of office, but once executed a warrant of a juſtice directed to the borſholder. And this the ſeſſions determined to be gaining a ſettlement within the 9 & 10 *W.* 3. *c.* 11. *Sed per curiam*, The order muſt be quaſhed, for the words of the act are, "being legally placed in ſuch office," that is, being the officer both *de facto* and *de jure*, which this man was not, the order ſtating negatively, that he was not legally placed therein, which can only be by an appointment and ſwearing in (1).

(1) It was alſo ſtated negatively, "that there was no preſentment of jury of the leet." *Vide* *Rex* v. *Winterbourne*, *Burr. S. C.* 520. *Bl. Rep.* 452.

Green *verſ.* Brown. At Guildhall.

A ſhip never heard of is preſumed to be foundered at ſea.

THE ſhip *Charming Peggy* was inſured in 1739, from *North Carolina* to *London*, with a warranty againſt captures and ſeizures. And in an action the loſs was laid to be by ſinking at ſea. All the evidence given was, that ſhe ſailed out of port on her intended voyage, and has never ſince been heard of. And

ſeveral witneſſes proved, that in ſuch a caſe the preſumption is, that ſhe foundered at ſea, all other ſort of loſſes being generally heard of. The underwriter inſiſted, that as captures and ſeizures were excepted, it lay upon the aſſured to prove the loſs happened in the particular manner declared on. But the Chief Juſtice ſaid, it would be unreaſonable to expect certain evidence of ſuch a loſs, as where every body on board is preſumed to be drowned; and all that can be required is the beſt proof the nature of the caſe admits of, which the plaintiff has given; he therefore left it to the jury, who found the loſs according to the plaintiff's declaration (1).

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(1) *Newby* v. *Read, Sit. after Mich.* 3 *Geo.* 3. S. P. *Park on Mar. Inſ.* 63 *quod vide.*

Underwood *verſ.* Parks. At Middleſex Sittings.

The truth of words cannot be given in evidence on Not guilty.

IN an action for words, the defendant pleaded Not guilty, and offered to prove the words to be true, in mitigation of damages: which the Chief Juſtice refuſed to permit, ſaying that at a meeting of all the Judges upon a caſe that aroſe in the Common Pleas, a large majority of them had determined, not to allow it for the future, but that it ſhould be pleaded, whereby the plaintiff might be prepared to defend himſelf, as well as to prove the ſpeaking of the words. That this was now a general rule amongſt them all, which no Judge would think himſelf at liberty to depart from, and that it extended to all ſort of words, and not barely to ſuch as imported a charge of felony (1).

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(1) *Dennis* v. *Pawling, coram Price* B. at *Bodmyn, Trin.* vac. 1716. S. P. 12 *Vin.* 150. *pl.* 16. Where the words imported a charge of felony. *Vide Smith* v. *Richardſon, Barnes* 195. *Com. Rep.* 551. *Prac. Reg.* 383. S. C. S. P. So where the words import a *general* charge of crimes not capital, the truth cannot be given in evidence in mitigation. *Biſhop of Sarum* v. *Naſh, per Parker* C. J. *Bull. L. N. P.* 9. But it has been held prior to the preſent caſe, that where the charge is of a particular and ſpecified criminal act not capital, the defendant may give the truth of it in evidence. *Smithies* v. *Harriſon, per Holt* C. J. 1 *Ld. Raym.* 727. And where the words charged impute a capital crime, if the plaintiff gives evidence of other expreſſions to the ſame purport in aggravation, the defendant may in mitigation, give evidence that theſe laſt are true for he had no opportunity to plead it. *Colliſon* v. *Loder, Oxon.* 1750. *Per Burnet* J. *Bull. L. N. P.* 10.

Hilary Term

17 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir William Chapple, *Knt.*
Martin Wright, *Esq*;
Thomas Denison, *Esq*; } *Justices.*

Sir Dudley Ryder, *Knt. Attorney General.*
The Hon. William Murray, *Solicitor General.*

Wilson, on the Demise of Eyre, Clerk, *vers.* Carter et al'.

Conditional surrender of a prebend's lease good to warrant a renewal.

2 Burn's Eccl. L. 333.
3 Bac. Abr. 345.

THE lessor of the plaintiff, being a prebendary of *Sarum*, brought an ejectment to avoid a lease made by his predecessor, as not being conformable to the proviso in 32 *H.* 8. *c.* 28. § 2. which requires, that upon renewals the old lease must be expired, surrendered, or ended, within one year next after making of the new lease. And his objection was, that the surrender made of the former lease was with a condition, that if the then prebendary did not within a week after grant a new lease for three lives, the surrender should be void; whereby (as was contended for the plaintiff) the old term was not absolutely gone, but the lessee reserved a power of setting it up again. But the court after two arguments, gave judgment for the defendants: this being within the intent of the statute, which was that there should not be two long leases standing out against the successor. Here the new lease was made within the week, and from thence it became an absolute surrender both in deed and in law. And the whole was out of the lessee, without further act to be done by him. In the proviso there is the word *ended* as well as surrendered,

rendered, and can any body fay the firft leafe is not at an end? This was no more than a reafonable caution in the firft leffee, to keep fome hold of his old eftate, till a new title was made him.

Dominus Rex *verf.* Beftland.

No *certiorari* for defendant to Judges of affize. Ante 877. and the cafes in the note.

THE court refufed to grant the defendant a *certiorari* to remove an indictment for a mifdemeanor from *Dorfet* affizes.

Rivet et al' *verf.* Cholmondley et al'.

Plaintiff may amend the *venue*.

UPON the authority of *Stroud* v. *Tilley*, (*ante* 1162.) the court fuffered the plaintiff to amend the *venue*, after the defendant had changed it upon the common affidavit (1).

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(1) *Vide Cowp.* 409.

Lord Vane's Cafe.

The court will not inquire into the truth of articles of the peace. But the court may review them after fecurity has been ordered upon them, and hear objections arifing upon their face.

HIS lady exhibited articles of the peace againft him, and was ordered fecurity upon them: when my lord came into court, Mr. *Lloyd* defired the articles might be read, and infifted they were no ground for demanding fecurity; or if they were, yet the fact of a feparation under articles, upon which the complaint was grounded was falfe, and he offered to prove it fo.

Strange contra, oppofed going into any fuch inquiry, it having never been done: and the courfe of the law had been, to give that credit to the oath of the party, as to order fecurity immediately upon it; mentioning alfo the inconvenience in opening a door for vying and re-vying on fuch occafions. He admitted, that the court might properly review the articles, and hear any objections arifing on the face of them.

Et per curiam, That is all we can do, the other never was attempted before, and we muft preferve the courfe of the court by taking the articles to be true. Upon the review the court was of opinion, the facts as ftated required fecurity. And it was given accordingly.

Dominus Rex *verſ.* Dr. Bridgeman.

No rule to inſpect books on claim of right to hold a leet.

A Rule being made for him to ſhew cauſe, why an information in nature of a *quo warranto* ſhould not be granted, to ſhew by what authority he claimed to hold a court-leet in the borough of *Wigan* in *Lancaſhire*: he moved for the common rule to inſpect the books of the corporation, who were the proſecutors, and it was granted. But upon ſpecial motion it was afterwards diſcharged, this being a matter of a private claim between the defendant and the corporation; and if this ſhould prevail, one private man would have as good a right to inſpect the deeds and evidences of another (1).

(1) *Vide Hodges* v. *Atkis*, 3 *Wilſ.* 398. *Cox* v. *Copping*, 5 *Mod.* 395. 1 *Ld. Raym.* 337. *Turner* v. *Getbin*, 12 *Vin. Ab.* 466. *pl.* 11. *Wood* v. *Davis*, 1 *Wilſ.* 104. *Rex* v. *Fraternity of Hoſtmen*, *poſt.* 1223. and the note.

Duthy *verſ.* Tito et al'.

Tito *verſ.* Duthy.

Coſts cannot be ſet againſt coſts.

IN both cauſes the verdict was for the defendants. And now *Tito* one of the defendants in the firſt cauſe moved, that the coſts he was to pay to *Duthy* in the ſecond cauſe might be ſet againſt the coſts *Duthy* was to pay in the firſt.

Sed per curiam, It cannot be done, there was forced to be an act of Parliament in the caſe of mutual debts: beſides, how can we prefer *Tito*, who is but one defendant out of five, when the plaintiff in that action may pay the coſts to either of the others (1).

(1) *Powell* v. *Smith*, *Bull. L. N. P.* 336. *Goodtitle* on the demiſe of *Clewlow* v. *Lowe*, *Barnes* 130. *Ford* v. *Miles*, cited *ib.* 131. acc. But the law ſeems now ſettled to be otherwiſe. *Sceſſin* v. *Robinſon*, *Barnes* 145. *Roberts* v. *Biggs*, *Barnes* 146. *Bull. L. N. P.* 336. S. C. *Thruſtout ex dem. Barnes* v. *Crafter*, 2 *Black.* 826. *Nunez* v. *Modigliani*, *H. Black.* 217. *O'Connor* v. *Murphy*, *H. Black.* 657. Though theſe are caſes decided in *C. B.* yet it appears from *Mitchell* v. *Oldfield*, 4 *Term Rep.* 123. that the ſame rule is adopted in *B. R.* But the practice of the two courts with reſpect to allowing the attorney a paramount lien, for his bill of coſts differs. In *C. B.* they permit coſts

costs in cross actions to a set-off against each other without any regard to this lien. *Roberts* v. *Mackoul*, *Say*. *Costs* 254. Cited 2 *Black*. 827. *Nunez* v. *Modigliani*, 1 *H. Black*. 217. *Schoole* v. *Noble*, *ib*. 23. But in *B. R.* the costs and debt recovered in one action can only be set off against those obtained in another after a deduction of the attorney's bill for his costs in the latter suit. *Mitchell* v. *Oldfield*, 4 *Term Rep*. 123.

Dominus Rex *verf.* Chetwynd.

Where on an indictment for murder the prisoner pleads the King's pardon before conviction, the court will not require bail for his appearance to answer an appeal under 3 H. 7. c. 1. They will not require him to give securities for his good behaviour under 5 & 6 W. & M. c. 13. unless he appear to be a person of ill fame. See the trial in St. Tr. ix. 527.

A Special verdict on an indictment for murder was found at the *Old Bailey*, and removed into the King's Bench. But before argument the defendant obtained his Majesty's pardon, which he pleaded upon his knees, and it was allowed. Then the counsel for the prosecutor insisted, that by virtue of 3 *H*. 7. *c*. 1. the court ought to require bail for his appearance to answer an appeal; there being an affidavit produced, that the brother and heir was beyond sea, but expected in time: and it was also insisted, that by virtue of 5 & 6 *W*. & *M*. *c*. 13. the court should take security for the good behaviour.

[1204] The statute 3 *H*. 7. *c*. 1. runs, "That if any person charged "as principal or accessory be acquitted at the King's suit within "the year and day; the justices before whom he is acquitted "shall not suffer him to go at large, but either remit him again "to the prison, or else let him to bail, after their discretion, till "the year and day be past."

Upon this clause it was argued, that the case of pleading a pardon after a special verdict was stronger than the case of an acquittal by jury; which took away all the presumption of guilt. And that this was an actual acquittal, and is called so in the pardon. The judgment is, *quod eat inde sine die*, and if he is again indicted, he may plead *auterfoits acquitte*. 11 *H*. 4. 41. *Bro*. *Corone* 29. 133. *F. N. B.* 251. *G.* And the record being moved into the King's Bench, this court are the Justices before whom he is acquitted: and it is not discretionary only as to the point between bail or imprisonment, the latter of which the prosecutor did not insist upon.

Slaughterford was acquitted before *Holt* at *Surrey* assizes, and he took bail to answer an appeal, which was afterwards tried at bar, and the party convicted and hanged. See his case in St. Tr. ix. 541. in notes. [Ante 402. 855. 858.]

But as to this point, the court were of opinion, that the present case was not such as the act of Parliament meant; and this being

being to subject the prisoner to a second trial, which before he was not, he not being indictable till the time to appeal was elapsed, till this act gave such a prosecution; it was therefore to be construed strictly, and confined literally to an acquittal by verdict (*Kelyng* 104.) upon an arraignment at the King's suit; and it was material, that no instance could be shewn of requiring such bail upon pleading a pardon; on the contrary *Bowen* in *Mich.* 8 *Ann.* was discharged without bail. *Aquittal* they said must be understood, *in a course of law*, and not an interposition of the crown's mercy. *Vide* Kelyng 25.

The other point as to sureties for the good behaviour depended on the 5 & 6 *W.* & *M. c.* 13. which enacts, "That the "justices before whom any pardon for felony shall be pleaded, "may at their discretion remand or commit the person pleading "it to prison, till he shall enter into a recognizance with two "sureties for his good behaviour for any time not exceeding "seven years, and if the party be an infant (which was the pre- "sent case) then he is not to be bound, but must find sureties." Upon this clause therefore the prosecutor insisted upon sureties for the good behaviour, and instanced 2 *H. H. P. C.* 394. where it is said, that at common law, without the aid of 18 *Eliz. c.* 7. a party acquitted may be bound to his good behaviour, *if of ill fame*.

The counsel for the prisoner did not much oppose giving sureties, and said they had them ready. And Mr. J. *Wright* and Mr. J. *Dennison* were inclined to take them. But as there had yet been no instance since the act, and this was merely discretionary, the Chief Justice was unwilling to make the precedent in the case of an infant, where some favourable circumstances were stated in the verdict. And the case *Hale* cites out of *Rastal's Entr.* was where (as the record says) *testatum fuit cur' per fidedignos*, that the defendant was of ill fame; and at last the others came in, to discharge him without security. [1205]

N. B. I, on behalf of the prosecutor, (the heir being beyond sea) desired it might be taken notice of, that we did not waive our demand: and upon that the court said, it should be their own act, upon the discretion of the court.

Easter Term

17 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir William Chapple, *Knt.*
Martin Wright, *Esq*;
Thomas Denison, *Esq*;
} *Justices.*

Sir Dudley Ryder, *Knt. Attorney General.*

The Hon. William Murray, *Solicitor General.*

Real et al' *vers.* Macky.

Foreigner not obliged to give security for costs.

THE plaintiffs were *Swedes*, and brought an action for freight: and I moved to stay their proceedings, till they should give security for costs, as is done where in ejectment the lessor of the plaintiff is an infant (1). *Sed per curiam*, This has never been carried further than actions *qui tam* (2); and it may affect trade, in shutting up our courts from foreigners, who perhaps cannot find security in a strange country. The cases in ejectment are considered as more under the power of the court than other proceedings (3), and therefore we stay a second till the

(1) *Noke* v. *Windham*, ante 694.

(2) *Vat qui tam* v. *Green*, ante 696.

(3) *Vide* the cases cited in the note to *Vat qui tam* v. *Green*, ut supra.

the costs are paid of the first (4), which we cannot do in other cases (5). There was no rule made (6).

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(4) *Vide Short* v. *King*, *ante* 681.

(5) *Knock* v. *Wilkins*, 2 *Kely.* 62. *Chapman* v. *Brown*, *ibid.* 163. *English qui tam* v. *Cox*, *Cowp.* 322. In *B. R. Lazarus* v. *Pritchard*, *Barnes* 126. in *C. B.*—But it seems settled that both courts will stay proceedings in a second action until the costs have been paid in a former one, if it appears the merits of the case have been fully tried therein, and the second is manifestly vexatious. *Hacker* v. *Newborn*, *Sty.* 413. *Lord Byron's* case, 1 *Vent.* 100. *Anon.* 2 *Lord Raym.* 1308. *Weston* v. *Withers*, 2 *Term Rep.* 511. *Monkton qui tam* v. *Bingham*, *ib. n. a.* *Baldwyn* v. *Richards* in *B. R. Grovenor* v. *Cape*, *Say. L. of Costs* 245. cited 3 *Wilf.* 140. 2 *Black. Rep.* 741. *Mitchell* v. *the Executors of Halsky*, 2 *Wilf.* 149. 2 *Black.* 741. S. C.

(6) It does not appear here whether the plaintiffs were resident abroad or in this country. But it has been held that foreigners shall not be obliged to give security for costs, although they do reside beyond the jurisdiction of our courts. *Carr* v. *Sharp*, cited 2 *Black.* 1742. *Lamii* v. *Sewel*, 1 *Wilf.* 206. *Nuncomar* v. *Burdett*, *Cowp.* 158. In *Maxwell* v. *Mayor*, 2 *Burr.* 1026. *Boswell* v. *Irish*, 4 *Burr.* 2105. *Golding qui tam* v. *Barlow*, *Cowp.* 24. and the court have in these cases always stated the practice to depend upon numberless authorities. In later cases however *B. R.* has resolved to stay the proceedings when the plaintiff *resides* abroad, whether he be a foreigner or native. *Pray* v. *Edie*, 1 *Term Rep.* 267. *Fitzgerald* v. *Whitmore*, *ib.* 362. *Doe on dem. Selby* v. *Alston*, *ib.* 491. *De La Preuve* v. *Le Duc de Biron*, 4 *Term Rep.* 697. In this latter case the court has said that the defendant can not require this security until he has put in bail, but it does not appear from any printed authority that I have been able to meet with, that *B. R.* will exact this security from a foreigner who is plaintiff and resides within this kingdom. And the court of *C. B.* will not compel a plaintiff to give security for costs solely upon the reason of residence abroad, or being a foreigner if he dwell here. *Parquot* v. *Eling*, 1 *H. Black.* 106. *Porrier* v. *Carter*, *ibid.*

Between the Parishes of Beccles *and* Leowstoff in Suffolk. [1207]

> Absence of servant by the master's permission does not prevent a settlement. Burr. Sett. Ca. 230. S. C. Ante 423. and the notes. Post 1232.

THE *pauper* was hired to a blacksmith for a year at 3 *l. per annum*, to be paid when wanted by the servant. During the year the master gave him leave to work with another smith for three days, with another for a week, and with a third for a fortnight, and agreed the servant should have the advantage of it; after which he returned and staid out the year, and the master by his consent deducted the proportion of wages for the time he was away: and upon this state of the case the sessions held no settlement was gained, the first contract being dissolved. *Sed per curiam*, The order must be quashed, for this is not a dissolution of the contract, but a licence to be absent; and both parties considered

sidered it so, by continuing together to the end of the year; the accelerating the payment of wages for the convenience of the servant, which is usually done, without a particular agreement, makes no alteration.

Case of the Rector of Wigan.

Mandamus to burgesses to attend court-leet to make a jury. Wils. 76. S. C.

HE claimed as lord of the manor to hold a court-leet, at which the in-burgesses of *Wigan* ought to attend to make a jury, which they having refused and neglected to do at two courts, whereby no business could be done, the court granted a *mandamus* to enforce their attendance (1).

(1) So also to a jury of a leet to present one duly elected mayor. *Rex* v. *Willis*, *Andr.* 279. and to the homage of a court baron to present conveyances of burgage tenures. *Rex* v. *Lord Montacute*, 1 *Black. Rep.* 60. 1 *Wils.* 283. S. C. *et vide Rex* v. *Banks*, 3 *Burr.* 1452. 1 *Black.* 452. S. C.

Sims's Case.

Husband may swear the peace against his wife. 4 Com. Dig. Forceable Entry. (D. 22.)

HE exhibited articles of the peace against his wife, and the court received the same without any objection.

Ashley *vers.* Kell.

Future effects of a second bankrupt continue his property till seized.

UPON motion for a new trial, the court held, that though under 5 *Geo.* 2. *c.* 30. the future effects of a bankrupt whom two commissions had issued, were liable to be seized for the benefit of creditors (1); yet the bankrupt had in the mean time such a property in them, as enabled him to transact and sell to a *bona fide* purchaser (2).

(1) *Ex parte Proudfoot*, 1 *Atk.* 253. *Evans* v. *Mann*, *Cowp.* 569. In *Martin* v. *O'Hara*, *ib.* 824. But they are not entitled to the profits of his personal labour. *Chippendale* v. *Tomlinson*, *Cooke's Bank. Law*, 3*d Ed.* 518.

(2) *Troughton* v. *Gitley*, *Amb.* 630. *Chippendale* v. *Tomlinson*, *Cooke's Bank. Laws* 518. *Callen* v. *Meyrick*, 1 *Term Rep.* 361.

Dominus Rex *verſ.* Roberts.

THE defendant having traverſed an inquiſition, whereby he was found to be a lunatick; the Attorney General filed the common replication: and it was ſent from the petty-bag office to the King's Bench: the proſecutor of the commiſſion made up the record, and carried it down to trial; and Mr. *Roberts* being ill, he did not appear, and no defence was made, and the jury found in favour of the inqueſt.

The traverſor of an inquiſition for the King is to be conſidered as a defendant.

Upon this a new trial was moved for upon two points. 1. That the ſuppoſed lunatick was in the nature of a plaintiff, and therefore had the right to carry down the record: and his traverſe is in the nature of a *monſtrans de droit.*

Upon ſuch a traverſe therefore in the caſe of lunacy the proſecutor of the commiſſion has a right to make up the record and carry it down to trial. See the proceedings upon this caſe in chancery. 3 Atk. 5. 308.

To this it was anſwered, and reſolved by the court, that he was properly to be conſidered as a defendant, oppoſing the title found for the crown, without ſetting up any title in himſelf, as he might do in a petition of right. And *Vaugh.* 62. and Lord *Somers's* argument in the *Banker's caſe*, and 4 *Hen.* 6. 13. *a.* were cited, and the form of the entries in *Tremain* 628, 652. *Coke's Ent.* 404, &c. ſhew it to be ſo. And indeed it would be abſurd, to conſtrue the liberty of traverſing, to give a power of delaying the crown; which muſt be, if the party is conſidered as having the common right of a plaintiff. It was therefore held, that the record was well made up, and carried down by the proſecutor of the commiſſion.

The ſecond point was upon the illneſs of *Roberts*, who could not attend, and which was made out by affidavits. And the court thought it reaſonable to grant a new trial for this upon the foot of accident, and becauſe the Lord Chancellor and the former jury both had an inſpection, which might be of great uſe to a ſecond jury, who otherwiſe would be left to judge upon leſs evidence than the others had had.

A new trial was granted upon payment of coſts. And at another day the court ordered it, upon the application of Mr. *Roberts*, to be tried at the bar by a jury of *Devon*, where the former inquiſition was taken.

Beliſante *verſ.* Levy. [1209]

THE affidavit to hold to ſpecial bail being defective, common bail was ordered; and thereupon the plaintiff on 19th *April* made a full affidavit, and took out a new writ, and held the defendant to bail; and the next day, 20th *April*, moved to diſcontinue upon payment of coſts. *Et per curiam*, The plaintiff has been too quick, for he ſhould have had the coſts taxed and paid, before he took out a new writ. Therefore let the

If a ſecond writ is taken out pending the firſt, common bail ſhall be taken.

the defendant be discharged upon common bail, and let the plaintiff pay him his costs of this application (1).

(1) *Vide Belchier* v. *Gansell*, 4 *Burr.* 2502. *Olmius* v. *Delany*, *post* 1216.

Rios *vers.* Belisante.

Belief of debt is no ground for special bail. Ante 1157.

THE affidavit to hold to special bail was made by a merchant in *London*, swearing that the defendant owed the plaintiff 270 *l.* as appears by an affidavit made by the plaintiff in *Amsterdam*, which the deponent believes to be true. *Et per curiam*, There can only be common bail; for the oath abroad is no ground for our process, and then there is nothing but the belief of a third person, which is not sufficient (1).

(1) *Claphamson* v. *Bowman*, *post* 1226. *Van Morsell* v. *Julian*, 1 *Wils.* 231. *Pomp* v. *Ludvigson*, 2 *Burr.* 655, and the authorities there cited. *acc.*

Dominus Rex *vers.* Farewell.

Certiorari pro Rege lies in case of highways, tho' no affidavit or recognizance.

THE prosecutor of an indictment for a nusance in the highway took out a *certiorari*; and the defendant moved to quash it, there being no affidavit made, according to the statute 5 *W.* & *M.* *c.* 11. nor any recognizance given according to that and former statutes of 13 & 14 *Car.* 2. *c.* 6. and 22 *Car.* 2. *c.* 12. and 3 *W.* & *M.* *c.* 12.

But the court on considering those acts held, that they related only to *certiorari*'s applied for by defendants, and not to one *pro Rege*, as this was. And many precedents were shewn of *certiorari*'s for a prosecutor taken out in the manner this was, and the *certiorari* was allowed (1).

(1) A report of this case purporting to be taken by Mr. *Masterman* at that time secondary of the crown office, which the editor has seen, after stating the argument of Mr. *Henley* for the defendant, reports the opinion of the court as follows, " *Lee* C. J. Enlarge the rule for a " day or two and we will look into " the several acts of parliament, " but I own that I never did " know an instance where an af- " fidavit in such a case as this " was ever made by, or expected " from a prosecutor, or any re- " cognizance ever entered into. " If we should hold it necessary " we should make fine work in " the crown office by overturning " the proceedings in so many " cases

"cases of this sort as there have "been.—In the case of *Bewdley* "(1 *P. Wms.* 249.) the court "gave an opinion in the very "teeth of an act of parliament, "because the course of the court "and the practice of the crown "office had been otherwise. Mr. J. "*Chapple*, the legislature by these "acts of parliament never intend-"ed to lay the prosecutor under "any hardships or difficulties." That the *certiorari* to remove an indictment against private persons for not repairing an highway is not taken away, *vide Rex* v. *Inhabitants of Clace*, 4 *Burr.* 2456. in which case a distinction is taken where an indictment is actually prosecuted by the officer of the crown, and where it is carried on only in its name by a private prosecutor, and it is there laid down that in the former case the crown has in *every* instance a right to demand a *certiorari*. In *Rex* v. *Bodenham*, *Cowp.* 78. it was determined that a *certiorari* lay to remove an indictment upon 13 *Geo.* 3. *c.* 78. for a nuisance to an highway *before traverse*, at the instance of a private prosecutor.

Sale *verf.* Crompton.

A Warrant of attorney was given in 1732, to confess a judgment for *Crompton*, but the record of the judgment had left out the *r*, and it was made *Compton*. And now the court refused to amend it by the warrant, for fear of inconveniencies to purchasers.

Old judgment not amendable. 1 Wilf. 61. S.C. more at large.

Trinity Term

* 17 & 18. See Burr. S.C. 236. pl. 80. 1 Wilf. Rep. 75. n. to 2d Ed.

* 17 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Juſtice.*

Sir William Chapple, *Knt.*
Martin Wright, *Eſq;*
Thomas Deniſon, *Eſq;*
} *Juſtices.*

Sir Dudley Ryder, *Knt. Attorney General.*
The Hon. William Murray, *Solicitor General.*

Walmſley *verſ.* Roſon.

Practice in error. Ante 144.

AFTER judgment for the defendant the plaintiff brought error, and aſſigned infancy in the defendant, and appearance by attorney: then took out a *ſcire facias ad audiendum errores*, and after a *ſcire feci* returned, entered the default. And upon producing the record the judgment was reverſed on my motion, without making it a *concilium*, or putting it in the paper.

Dominus Rex *verſ.* Cornelius et al'.

No inſpection of books by a proſecutor of a miſdemeanour (1). 1 Wilſ. 142. S. C.

AN information was granted againſt them for a miſdemeanour in taking money on granting of licences to alehouſe-keepers at *Ipſwich.*

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(1) *Rex* v. *Worſenham*, 1 *Lord Raym.* 705. *Regina* v. *Mead*, 2 *Lord Raym.* 927. *Rex* v. *Doctor Purnell*, 1 *Wilſ.* 239. 1 *Black. Rep.* 37. S. C. *Rex* v. *Lee*, cited *ib.* *Rex* v. *Haydon*, 1 *Black. Rep.* 351. S. P. *Vide* alſo *Rex* v. *Fraternity of Hoſtmen*, &c. *poſt* 1223; and the caſes there cited.

The

The profecutor applied for a rule to infpect the books of the corporation, alleging the defendants were only juftices as they were bailiffs. But the Judges (*abfente* C. J.) upon confideration refufed to grant it, their right to be bailiffs or juftices not being in queftion. And it is in effect obliging a defendant indicted for a mifdemeanour, to furnifh evidence againft himfelf.

Goodtitle *verf.* Meymott.

IN the declaration delivered to the tenant in poffeffion, *the faid James* inftead of *John*, was faid to enter by virtue of the demife; and the court refufed to amend it, for they confidered it as a procefs. And Mr. Juftice *Wright* cited a (*a*) cafe, *Hil.* 15 *Geo.* 2, where the premiffes were laid to lie in *Twickenham* and *Iftleworth or one of them*, and the court refufed to let the plaintiff amend by ftriking out the difjunctive words (1)

Declaration in ejectment not amendable.

(*a*) The name of it was *Truetitle* v. *Afhburn & al'.*

(1) *Roe* v. *Doe on dem. of Stephenfon*, 2 *Barnes* 186. *Vide Oates* v. *Shepherd, poft* 1272, in *Parfons* v. *Gill, Lord Raym.* 896.

Dominus Rex *verf.* Bailey.

THE court refufed to quafh an indictment for not attending the mayor of *Sarum*, to execute his warrant and faid the defendant might demur to it (1).

What indictment not quafhable.

(1) *Vide* the feveral cafes in which the court have either quafhed an indictment or left the defendant to demur to it, collected 2 *Hawk.* P. C. *c.* 25. *f.* 146, and note [H] 7 Ed. 4 vol. 83.

Swaine *verf.* De Mattos. At Guildhall.

IN a queftion about a bankruptcy, the Chief Juftice held, that though the preamble of 7 *Geo.* 1. *c.* 31. fpeaks only of bonds given for goods in trade payable at a future day, yet the enacting words extend to all forts of bonds for the payment of money; and that the words *fuch fecurity* do not mean fecurity for fuch a fort of debt, but fecurity by bonds, bills, notes, *&c.* (1).

Conftruction of 7 G. 1. as to bonds payable at a future day

(1) *Per Wilmot* C. J. in *Chilton* v. *Whiffin*, 3 *Wilf.* 17. and *Goddard* v. *Vanderheydon*, 3 *Wilf.* 262. *Pattifon* v. *Banks, Cowp.* 546. S. P. So a bond for payment of an annuity for a term of years is within this ftatute, *ib.* So alfo a bond to pay a debt by inftalments, *Brooks* v.

Lloyd, 1 *Term Rep*. 17. It extends also to goods sold on credit. *Cockran* v. *Love*, at *N. P.* cor *Ld. Kenyon*, C. J 3d *June* 1790. *Cock's Bank. Laws* 23. 3d Ed. But a contract at an *East India* sale by *A.* for a parcel of goods to be paid for at a future day before which *A.* becomes a bankrupt, the goods not being delivered, is not *Ex parte* the *East India Company*. 2 *P. Wms*. 395.

Banbury *verſ.* Liſſet et al'. At Guildhall.

What is not a bill of exchange, or abſolute acceptance.

THE plaintiff declared upon the cuſtom of merchants againſt the defendants as acceptors of a bill of exchange: and the inſtrument run in theſe words:

[1212] *Meſſieurs* Gilly *and Co.* 4 Feb. 1741.
Pray pay Mr. Richard Banbury *one month after date two hundred pounds on account of freight of the* Veale *galley* Edward Champion, *and this order ſhall be your ſufficient diſcharge for the ſame.*
J. Gibſon.

Accepted for Liſſett *and* Gilly *of* Leghorne *to pay as remitted from thence at uſance.*
18 March 1741. H. Gilly.

And two objections were made by the defendants: 1. That this was not a bill of exchange, for it is not payable to order, ſo as to be negotiable (1) it is not ſaid to be for value received. And it is only an order upon a particular fund, like the caſe of *Jenny* v. *Herle*, (*ante* 591.) and ſeveral merchants proved, that they did not look upon it to be a bill of exchange; and others were of a contrary opinion.

The Chief Juſtice ruled it not to be a bill of exchange. He ſaid it was not in the power of the parties to make what form they pleaſe paſs for ſuch a bill, it ought to be agreeable to the *lex mercatoria*: the privilege ariſes from the convenience to trade, which is not conſulted in this caſe. And he thought it bad upon the objection to the fund out of which it was to be paid (2): however, being a mercantile tranſaction, he left it to the ſpecial jury of merchants: who found it to be no bill of exchange, on the objection for want of value received (2).

(1) This objection was taken in *Chamberlyn* v. *Delarive*, 2 *Wilſ.* 353. where the court gave no opinion upon the point. But in *Smith* v. *Kendal*, *Mich.* 35 *Geo.* 3. they decided a bill to be negotiable without theſe words. See the declarations alſo in *Mannin* v. *Cary*, 1 *Lutw.* 277. *Horton* v. *Coggs*, 3 *Lev.* 296. And that they are not neceſſary in promiſſory notes, *vide Moore* v. *Paine*, *Caſes in B. R. temp. Hard.* 288.

(2) *Vide.* That this is unneceſſary *Macleod* v. *Snee*, 2 *Lord Raym.* 1481. *Evelyn* v. *Merry*, 1 *Barn. B. R.* 88. *Joſelin* v. *Laſerre*, *Fort.* 282. *Death* v. *Serwonters*, 1 *Lutw.* 889. *Jenny* v. *Heale*, 8 *Mod.* 267. *Cramlington* v. *Evans*, 1 *Show.* 5. 1 *Mod. Ent.* 410. and *White* v. *Ledwicke*, *Baily on Bills*, *Appendix No.* 3, where the point is conſidered as ſettled.

The

The ſecond objection was, that the plaintiff (ſuppoſing it a bill of exchange) had not ſhewn there was any remittance to the defendants. And that this was not an abſolute acceptance but only conditional. And ſo the Chief Juſtice declared he underſtood it, and left it to the jury (3). But they finding for the defendants upon the firſt point, gave no opinion as to this.

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(3) *Smith* v. *Abbot*, *ante* 1152. *Julian* v. *Shobrooke*, 2 *Wilſ.* 9. S. P. But it is now held, that it is the ſole province of the court to decide what is an abſolute and what a conditional acceptance, and that it is not a queſtion for a jury. *Sproat* v. *Matthews*, 1 *Term Rep.* 182. *Per Buller* and *Aſhburſt* J. *Willes* J. *contra*.

Michaelmas Term

18 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir William Chapple, *Knt.* Martin Wright, *Esq;* Thomas Denison, *Esq;*	*Justices.*

Sir Dudley Ryder, *Knt. Attorney General.*

The Hon. William Murray, *Solicitor General.*

Dominus Rex *v.* Goudge.

Quo warranto lies for the office of constable.

THE court granted an information in the nature of a *quo warranto* against him, to shew by what authority he exercised the office of a constable for *Whitechapple* parish, under a pretence of an election at the vestry, and a swearing in at the sessions. For *per curiam*, *Prima facie* the right of appointing is in the leet, and the sessions have no power by 13 & 14 *Car.* 2. *c.* 12. except there is a default at the leet (1). And this office of constable is of such a nature, that informations have been granted to try the right. Particularly *Hil.* 14 *Geo.* 2. *Dominus Rex* v. *Franchard*, where the court made no difficulty on that head though they discharged the rule upon the merits.

Ante 1149.

(1) *Constable of Limington's* case, *ante* 798. *Vide Rex* v. *Sir Thomas Reynell*, *ante* 1161, and the note.

Dominus Rex *verf.* Roberts.

ON a trial at bar of a traverfe to an inquifition of lunacy, one of the jury was called by the name of *Henry*, and informed the court he was chriftened by the name of *Harry*, but owned he was the perfon fummoned; it was propofed to alter it by confent; but the defendant's counfel refufing, the court ordered it to be amended *ex officio*, by virtue of the ftatutes of 8 *Hen.* 6. *c.* 12. and *c.* 15. And fo the trial went on.

Amendment. Ante 1208. 1 Com. Dig. Tit. Amendment. (F.454.)

Bolton *verf.* Prentice.

IN *affumpfit* for goods fold and delivered to the defendant's wife, the cafe appeared to be, that the defendant and his wife had formerly lodged at the plaintiff's houfe, and the plaintiff furnifhed her with goods; and the defendant finding the plaintiff had helped her to pawn her watch, and fufpecting he confederated with her, left the lodgings, after paying the plaintiff his bill, and forbidding him ever trufting her again.

A hufband who turns away his wife without caufe and refufeth to provide for her, cannot make a particular prohibition. Vide Salk. 118. Ld. Raym. 1006.

After this the defendant and his wife cohabited together for a year, when without any caufe appearing he left her, locked up her cloaths, and upon her finding him out, refufed to admit her, and ftruck her, and declared he would not maintain her, or pay any body that did. In this diftrefs fhe borrowed cloaths of her friends, and applied to the plaintiff, who furnifhed her with neceffaries according to the defendant's degree; which the defendant refufing to pay for, this action was brought; and upon trial the jury found for the plaintiff.

Upon motion for a new trial, the court held the verdict was right; for whilft they were at the plaintiff's, there was a particular reafon for the particular prohibition; yet the caufelefs turning her away deftitute afterwards, gave her the general credit again: and if a hufband fhould be allowed, under the notion of a particular prohibition, to deftroy her obtaining credit in one place, he may in the fame manner prevent it with all people fhe is acquainted with. He appears to be a wrong-doer, and therefore has no right to prohibit any body. They diftinguifhed this cafe from the cafe of *Manby* v. *Scott*, 1 *Sid.* 109, for there the wife was guilty of the firft wrong in eloping (1).

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(1) A feme covert is in general unable to enter into any contract, *Vide Gilb. Law of Evidence*, 3d Ed. 183. *Bull. L. N. P.* 134. But where the hufband and wife cohabit, if the latter take up goods it is *primâ facie* evidence of a contract entered into by the hufband

husband through the means of his wife as his agent. *ib. Langfort* v. *Tyler*, *Salk.* 113. But the law has considered this presumption as stronger and less easy to be repelled where the contract is for such necessaries for the wife and family as are suited to the rank and circumstances of the husband. In the present note it is proposed to consider merely how far such contracts of the wife bind the husband. In doing which it will be necessary to see, FIRST, what the law is WHILE THE BARON AND FEME LIVE TOGETHER. SECONDLY, WHAT IT IS WHEN THEY LIVE SEPARATE. In the FIRST case, the husband is liable to the wife's contract for necessaries, *Dier* v. *East*, 1 *Vent.* 43. 1 *Mod.* 9. 1 *Sid.* 425. S. C. *Beaumont* v. *Weldon*, 2 *Vent.* 155. and that though she conduct herself unchastely, *Robison* v. *Gosnold*, 1 *Salk.* 119. 6 *Mod.* 171. S. C. or contract for them with an improper design of converting them to some other use, or of injuring the husband. But of this the tradesman must be ignorant, *Morton* v. *Withens*, *Skinn.* 348. *Sed vide Etherington* v. *Parrot*, *infra*. But if the tradesman selling *receives specific notice* either by himself or his servant not to credit her, the husband will not in this case be liable, *Etherington* v. *Parrot*, 1 *Ld. Raym.* 1006. *Longworth* v. *Hockmore*, 12 *Mod.* 244. 1 *Ld. Raym.* 444. S. C. Thus far the engagement of the wife affects the husband upon the presumption that during their union he has authorised her generally to contract as his representative for such things as being within her domestic province may be supposed to be entrusted to her management. But we have seen from the cases just cited, that this presumption may be rebutted by express notice that she is not. But, in the SECOND CASE put; that is, WHERE THEY ARE SEPARATED. Separation destroys the presumption of agency, and where any notice can discharge the husband, the notice of that circumstance will be as good as a specific desire not to credit her. Here however it is to be observed that the law accommodating itself to human exigencies does in some situations refuse to raise any presumption in favour of the contract so as to affect the husband at all; while in others it raises one so violent, that no notice, however strongly brought home to the person trusting the wife can exonerate him from the burthen of her agreement. This depends upon the manner in which the separation between the parties has taken place; and there seem to be *five* different ways in which it may occur so as to have an effect in some degree different upon the husband's liability to be bound by the contracts of his wife. The first case is, *Where they are parted by consent, and the wife is allowed a separate maintenance.* In this case the husband is not liable, *Todd* v. *Stokes*, 1 *Ld. Raym.* 444. 1 *Salk.* 116. S. C. *Ferrars* v. *Ferrars*, 1 *Vern.* 71. *Augies* v. *Augies*, *Prec. in Chanc.* 499. *Rep. verbatim* the same *Gilb. Eq. Rep.* 153. *Dent* v. *Scot*, *Alleyn* 61. *Cragg* v. *Bowman*, 6 *Mod.* 147. In *Corbet* v. *Polnitz*, 1 *Term Rep.* 9. and where the husband was of a low degree, the earnings of the wife have been held equivalent to such a maintenance, *Warr* v. *Huntley*, *Salk.* 118. Most of these cases seem to state that a public notice of the separation, although not a specific one to the individual who gives her credit is necessary to discharge the husband. But *Cragg* v. *Bowman*, *ut supra* is *contra*. Where this separation has thus taken place, and there has been

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an allowance of a sufficient maintenance to the wife, recent determinations have not merely held the husband discharged from the obligation of contracts entered into by her, but have regarded her as being *sui juris* with regard to matters of property, in the same manner as she is by the civil law. They have considered her therefore as being so far emancipated by the agreement from the incapacities incident to coverture, as to be capable of contracting not only for necessaries, but for every other thing which can be made the subject matter of agreement, and consequently as being liable to be sued in courts of common law as if she were a feme sole. This exception to the general rule of law, although new in its application to this situation which the customs of present times have given birth to, yet seems warranted by the principle of the old law, which likewise conformed to the existing manners of the age, and restored a feme covert to her capacity to contract and sue where the situation of the *baron* made it impossible for him either to manage the concerns, or interfere for the protection of his wife and family; as when he has been in exile, or abjured the realm, *Co. Lit.* 132. *b.* 4 *Vin. Abr.* 15?. Courts of equity also have indulged her in the separate enjoyment of property even while living with her husband, and have invested her with necessary powers to defend it against him, *Kirk* v. *Clark*, *Prec. in Chanc.* 275. *Griffith* v. *Hood*, 2 *Vez.* 452. Nay, have allowed her such an independent existence as to permit her to be sued by him in matters relating to it, *Brooks* v. *Brooks*, *Prac. in Chanc.* 24. *Moore* v. *Moore*, 1 *Atk.* 272. The propriety of the decisions of courts of law upon this subject however have been questioned by great authority, *vide Hatchet* v. *Baddeley*, 2 *Black. Rep.* 1079. and the opinion of Lord *Kenyon* C. J. in *Ellab* v. *Leigh*, 5 *Term Rep.* 682. I am aware of no case in which a woman in this situation has brought an action to enforce a contract entered into with her. But the principle by which others are enabled to sue her must go the length of reciprocally enabling her to sue them, and the former has been sustained in the following cases, *Ringstead* v. *Lady Lanesborough*, *Hil.* 23 *Geo.* 3. *B. R.* *Barwell* v. *Brooks*, *Hil.* 23 *Geo.* 3. *B. R.* *Sparrow* v. *Caruthers*, *Carlisle assizes* 1768. *cor.* *Yates* J. cited 1 *Term Rep.* 67. *Corbett* v. *Poelnitz*, *Ib.* 5. *Compton* v. *Collinson*, 1 *H. Black.* 364. 2 *Bro. Chanc. Cas.* 377. S. C. *Lean* v. *Schutz*, 2 *Black.* 1195. *Vide* also *E. Wilmot*'s case, *Moore* 851. *Deerly* v. *Dutchess of Mazarine*, *Salk.* 116, 1 *Ld. Raym.* 14. *Comb.* 402. S. C. *Peacock* v. *Monk*, 1 *Vez.* 193. But to make her liable to be sued thus, she must not only live separate from her husband, but must have a maintenance independent of him, *Gilchrist* v. *Brown*, 4 *Term Rep.* 766. and it must be permanently secured to her, *Ellab* v. *Leigh*, 5 *Term Rep.* 679. *Stedman* v. *Gooch*, *Espinasse's Ca. at N. Pri.* 2. But we have already seen, that this permanent subsistence is not necessary merely to discharge the husband. The second case is, *When the wife has eloped with an adulterer*, and then also the husband is not liable, *Car* v. *King*, 12 *Mod.* 372. *Morris* v. *Martin*, *ante* 647. *Manwaring* v. *Sands*, *ante* 700. The third is, *Where she has departed from him without his consent, but not with an adulterer*; in which case also she cannot bind the husband for necessaries, *Etherington* v. *Parrot*, *ut supra*.

Langworth

Langworth v. *Hackmore*, *ut supra*. *Child* v. *Hardyman*, *ante* 875. *James* v. *Warren*, *Holt* 104. But there is this distinction between the two cases, that in the latter if the wife offers to return and the husband refuses to receive her *at all*, his liability to be affected by her contract for necessaries, is perhaps revived from that time. *Manby* v. *Scot*, 1 *Bac. Abr. Baron and Feme* (H) 1 *Sid.* 109. 1 *Lev.* 4. 1 *Keb.* 69. 10. 87. 206. 337. 361. 383. 429. 441. 482. 1 *Mod.* 124. S. C. is *contra*. But *Twysden* J. and two other judges were dissentient. See *James* v. *Warren*, *ut supra*. *Child* v. *Hardyman*, *ante* 875. And in this case a general notice not to give credit to the wife seems necessary to exonerate the husband, *vide Langworthy* v. *Hackmore*, 1 *Ld. Raym.* 444. *Hinton* v. *Hudson*, *Freem. Rep.* 248. and the cases cited *supra*. But in the former case the husband must actually receive her again before she can contract so as to affect him, *Robison* v. *Gosnold*, *ut supra*. And the husband is discharged, whether the tradesman has notice of the separation or not, *Morris* v. *Martin*, *ante* 647. *Mainwaring* v. *Sands*, *ante* 706. The fourth case is, *Where the husband leaves his wife, though it be for her lewd conduct, or forces her to leave him by cruelty*. In this event she carries a general credit for necessaries along with her, and if a paricular prohibition from trusting her has been given, it is thereby revoked. See in addition to the present case, *Etherington* v. *Parrot*, *Salk.* 118. *Thompson* v. *Harvey*, 4 *Burr.* 2177. I have not met with any case deciding the liability of the husband, where he and the wife having parted by consent upon a parol agreement to allow her a sufficient maintenance, that allowance is afterwards with-held by him. But I suppose that he would be deemed liable from the time of his withdrawing it upon the same principle that he is held so in the two last cases. The fifth case is, *Where the husband and wife are separated in consequence of the sentence of the law*. When this is a *mensa et thoro* by sentence in the ecclesiastical court, the law allows her alimony at the discretion of the judge, unless she has eloped and lives with an adulterer, 1 *Black. Com.* 429. And as the common law gives her a writ to recover this, it would seem that the husband is excused from the obligation of her contracts, *vide Ellah* v. *Leigh*, 5 *Term Rep.* 679. Where she is sentenced to a temporary confinement as a punishment for some crime, the husband has been held not liable to her agreements, even for necessaries, if she is kept in an improper place by the covin of the gaoler, *Fowles* v. *Dinely*, *ante* 1122. But in *Scot* v. *Manley* the judges who argue for the plaintiff lay it down as clear law, that if a wife be prisoner for felony, and the gaoler provides her with food, that the husband may be charged for it, 1 *Sid.* 118.

Dominus Rex *vers.* Morgan.

Pardon pleaded *in forma pauperis*.

HE was convicted of perjury, and outlawed for forgery, but obtained his Majesty's pardon. And upon motion grounded on the common affidavit of poverty, and no cause shewn by the prosecutor, he was admitted to plead it *in forma pauperis*.

Unwin *verf.* Kirchoffe.

UPON motion to fuperfede the defendant, as not being charged in execution in two terms; the court held, that the *committitur* muft be actually entred on record before the end of the fecond term. And that there is no extenfion of the time to the continuance day after term, nor was it fufficient that there was an entry in the marfhal's book in time (1). Practice.

(1) *Fotterel* v. *Philby*, 3 *Burr.* 1841. S. P.

Landon *verf.* Pickering.

ERROR of a judgment *in Communi Banco* of *Michaelmas* term, 10 *Geo.* 2. in debt upon a *mutuatus*. And after affigning the want of an original, and verifying the fame, the defendant in error pleaded a releafe of errors dated 13 *November*, 10 *Geo.* 2. with an averment that there was no other judgment between the parties. And the plaintiff in error craving *oyer* thereof, it appeared, that the warrant of attorney and releafe of errors were both in one inftrument dated 13 *November*: and therefore on demurrer it was infifted, that it could not be applied to the judgment in queftion, which upon the *oyer* appeared to take its rife only on the 13th of *November*, whereas the judgment on record was generally of *Michaelmas* term, and referred to the firft day of the term: and there was nothing for the releafe to operate upon when it was given. And *Cro. El.* 837. 5 *Co.* 70. *b.* 28. *b.* *Allen* 71. *Salk.* 197. were cited.

A warrant of attorney and a releafe of errors of a day in term are good. 5 Com. Dig. Pleader. (3 B. 19.)

Sed per curiam, The two inftruments are very confiftent, if we take in the legal relation, as we ought to do, in order to give every part of the deed its proper operation; and then it will ftand as a judgment 23 *October*, and a releafe after. It would overturn many judgments by confeffion, if what the plaintiff in error contends for fhould prevail. The judgment therefore muft be, that the plaintiff in error take nothing by his writ.

Southoufe *verf.* Boak.

THE court refufed to change the *venue* into *Durham*, the Judges not going thither in the *Lent* circuit. Whereupon the defendant offered to try it in *Yorkfhire*, but the plaintiff refufing to confent, the court faid they could do nothing in it.

Venue not to be changed into a third county without confent (1).

(1) *Howarth* v. *Willet*, *ante* 1180.

Osgood *verſ.* Lyon.

On notice of trial the diſtance from *London* is taken by the computed miles.

ODIAM in *Hants* is reputed from 35 to 38 miles diſtance from *London*, but now upon ſetting up mile ſtones, it appears to be above 40. And on the queſtion, whether eight days notice of trial was good: the court held it to be ſo, they going by the computed miles, as was determined in the caſe of one who lived at *Aileſbury*, *ante* 954.

Olmius *verſ.* Delany.

Where a man may be held to bail in a ſecond action pending the firſt.

IN debt upon a bond for 900 *l.* the defendant put in bail, who juſtified in court, and were allowed. The plaintiff finding they were forſworn, and worth nothing, diſcontinued; but before he had done ſo, he arreſted the defendant in a ſecond action, and held him to bail. The defendant moved to be diſcharged on common bail, according to the caſe of *Bellifante* v. *Levy*, *ante* 1209, (1) and obtained a rule to ſhew cauſe: when the whole villany appearing, the court diſcharged the rule, and ſaid the plaintiff was right in laying hold of him as he did; for had he diſcontinued before, the defendant would probably have run away: and therefore ordered he ſhould be held to ſpecial bail. *Strange pro def'.*

(1) *Vide Turton* v. *Hayes*, *ante* 439, and *Whalley* v. *Martin*, *Barnes* 612. but ſee *Belchier* v. *Ganſell*, 4 *Burr.* 2502.

Dominus Rex *verſ.* William Clarke, Eſq;

Information againſt a juſtice for bailing a felon.

HE as a juſtice of *Surrey* committed a man on ſuſpicion of ſtealing a mare, and bound over the owner to proſecute. Afterwards upon examining two other perſons, he admitted the party to bail. The proſecutor appeared at the aſſizes, and found a bill, but the party accuſed did not appear. And the court granted an information againſt the juſtice, declaring they ſhould not have bailed the man themſelves.

[1217]

Webb qui tam *verſ.* Punter.

Practice.

IN debt for the penalty of 5 *l.* in killing a hare (with no other count) the court let the defendant bring in the penalty and coſts (1).

(1) *Stock* v. *Eagle*, 2 *Black.* 1052.

Case of the Bail of Peter Vergen.

HE was convicted for felony, and pardoned on condition of transportation. And having also a civil action depending against him, in which he had given bail, they brought him up by *habeas corpus* in order to surrender him. It was objected, that the court could not take him out of the custody of the sheriff, and commit him to the marshal; to which I answered, that upon the return of the writ he was to be considered as the prisoner of the court, who might do what they would with him, and send him back to *Newgate* for safer custody. So the bail were admitted to deliver him to the marshal, and the court immediately remanded him to *Newgate* (1).

The bail of a convict allowed to surrender in discharge of themselves.

(1) *Vide Fowler* v. *Dunn*, 4 *Burr.* 2034. where the authority of this case seems admitted, though the motion for an *Hab. Corp.* there was denied.

Gardiner *verf.* Holt.

AN infant sued by *prochein amy*, and there was a verdict against him and judgment for costs. And now being taken in execution, he moved to be discharged, and cited *Cro. Eliz.* 33. *Cro. Jac.* 640. *Sed per curiam*, If costs cannot be given, it will be matter of error to be insisted on; but we will not discharge him on motion. Where he is a defendant he certainly pays costs. *Dyer* 104. 1 *Bulst.* 189.

Where infant was plaintiff and in execution for costs, the court would not discharge him on motion.

Cooke *verf.* Colehan.

ON error from *C. B.* a note to pay to *A.* or order, six weeks after the death of the defendant's father, for value received, was held to be a negotiable note within the statute 3 *Ann.* c. 9. for there is no contingency, whereby it may never become payable, but it is only uncertain as to the time, which is the case of all bills payable at so many days after sight. *In Communi Banco* it held three arguments, and was held good upon a solemn resolution delivered by Chief Justice *Willes* (1).

What a negotiable note. 1 Wilf. 263. Ante 24. 706. 1151.

(1) *Bull. L. N. P.* 273. *Evans* v. *Underwood*, 1 *Wil.* 262.

Crawford *verſ.* Satchwell.

If the defendant omits to plead a miſnomer, he may be taken in execution by the wrong name.

THE plaintiff brought treſpaſs and falſe impriſonment by the chriſtian name of *Archibald.* The defendant juſtified under a *capias ad ſatisfaciendum* upon a judgment againſt *Arthur*; and averred that the plaintiff in this action was the ſame perſon who was ſued by the name of *Arthur.* And on demurrer the court held it a good plea, the defendant having miſſed his time for taking advantage of the *miſnomer*, which ſhould have been by pleading it in the firſt action. In the caſe of a bond given in a wrong name, he muſt be ſued by that wrong name, and the execution muſt purſue it. The defendant had judgment.

Taylor *verſ.* Waſteneys.

Common bail ordered though on a note given after a former action ſuperſeded.

THE defendant being arreſted for 25 *l.* lay in gaol till he was ſuperſeded. The plaintiff meeting him afterwards, got a note of him for 20 *l.* and brought a freſh action upon it, and held him to bail. But the court diſcharged him upon common bail, for it is but a farther ſecurity, and does not extinguiſh the former cauſe of action, which may be declared upon ſtill (1).

(1) *Vide Turner* v. *Schomberg*, *ante* 782. *Hall* v. *Howes*, *ante poſt.* 1233. *Chambers* v. *Robinſon*, 1039.

Hilary Term

18 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt.* *Chief Justice.*

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Martin Wright, *Esq*;
Thomas Denison, *Esq*; } *Justices.*

Sir Dudley Ryder, *Knt.* *Attorney General.*
The Hon. William Murray, *Solicitor General.*

Dominus Rex *verſ.* Turner et al'.

A Rule to ſhew cauſe why an appointment of overſeers for *Cirenceſter* ſhould not be quaſhed, was ſerved by a quaker, and on his affirmation made abſolute; this not being looked on as a criminal proſecution, though it is on the crown ſide, and the rule intitled in the King's name (1). Quaker.

1) *Robins* v. *Sayward*, *ante* 441. *Rex* v. *Wych*, *ante* 872.

Walrond *verſ.* Franſham.

AN executrix in order to hold the defendant to bail made an affidavit, that he was indebted to her teſtator (ſo much) as appears by the books of her teſtator. And it was held inſufficient, and common bail ordered (1). Swearing to a debt as appears by books will not hold to bail. Ante 1157. 1209.

(1) *Vide Pomp* v. *Ludvigſon*, 2 *Burr.* 655. and a long liſt of caſes cited in a note there. *Moultby* v. *Richardſon*, *Ib.* 1032. S. P. and more caſes to S. P. cited 4 *Burr.* 1094. and *Heathcote* v. *Goſlin*, *ante* 1157. But in the caſe of aſſignees, *executors*, *&c.* if the party

party swears that *he believes the account to be true*, it is sufficient to hold the defendant to special bail. *Barclay* v. *Hunt*, 4 *Burr.* 1993. *Tonna* v. *Edwards*, 4 *Burr.* 2283. *Sheldon* v. *Baker*, 1 *Term Rep.* 83. *Swayne* v. *Crammond*, 4 *Term Rep.* 176.

[1220]

Dominus Rex *versus* White et al'.

No *scire facias* on recognizance can be tested the day the party makes default.

THE condition of their recognizance was, to appear in the King's Bench the last day of *Michaelmas* term: on which day articles of the peace were exhibited, and the defendant *White* forbore to move to have his appearance recorded, (though he was there) and went to get bail. The prosecutor on this took out a *scire facias* tested 28 *November*. And partly for the sharpness of the proceeding, and because the *scire facias* must be tested in term time, and he had to the last moment of it to appear in, the court set aside the proceedings.

Hand *versus* Lady Dinely.

If the costs are not paid on bringing money into court, the plaintiff must go on and cannot have an attachment (1).

IN *assumpsit* the defendant brought 8 *l.* into court on the usual terms of paying costs to that time; the plaintiff took it out, and taxed his costs, and served the defendant's attorney; and they not being paid, went on to trial, and obtained a verdict for 7 *l.* 18 *s.* The defendant insisted that he should have no costs for his subsequent proceedings, since it appeared that he was over-paid: but the court held, that as to the costs, it was to be considered as if no motion had been made, the defendant not having fulfilled the terms of her own rule, in which case it is not usual to grant an attachment; but the plaintiff goes on, it being only a conditional rule. They said they would make him allow upon the execution for the 8 *l.* he had taken out of court, and ordered him the *postea* in order to tax his whole costs.

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(1) *Vide Scarralt* v. *Horton*, *Prac. Reg.* 259. *Barnes* 283. *S. C.*

Wilkins *versus* Brown.

Where the replication ought to conclude to the country. 1 Com. Dig. tit. Abatement. (E. 13.) 5 Com. Dig. Pleader. (2 D. 3.)

COVENANT by the plaintiff as executrix of *Bullock*: the defendant pleads, that there was another executor, who proved the will, administred, and is living; wherefore as he is not joined, he prays the bill may be abated. The plaintiff replies, that the other executor named in the will is an infant of seven years, and never administered, and concludes with an averment: to which the defendant demurred generally: and on argument by Serjeant *Belfield* and myself, the court held it an ill

ill replication; the plea (they said) contained full matter of abatement, if it was true; and the plaintiff should therefore have joined issue upon it, and not gone over to a matter of infancy, which would have been properly under consideration upon the issue: a probate granted to one under seventeen is not therefore void. And if the infant really was not joined in the probate, the plaintiff should have set it out on *oyer*, and have traversed the never administring as executor. *Vide* 1 *Lev.* 299. 1 *Brownl.* 101. and *Smith* v. *Smith* in *Yel.* and Sir *T. Jones's Reports.* The judgment was to abate the bill.

[1221]

1 Sid. 242. 1 Lev. 161.

Lekeux *verf.* Nash. At Guildhall.

Fraud cannot be gone into on a general replication of *non assignavit*, and an assignment by a former assignee to a beggar is not fraudulent.

2 Ld Raym 544

IN debt for rent against the defendant as assignee of a term, he pleaded that he had made a further assignment to one *Reed* before the time for which the rent was demanded. To which the plaintiff replied, *non assignavit.* And on the trial it appeared, that the defendant being weary of the assignment he had taken, employed a person to find him one who would take it off his hands; and *Reed* a poor woman, then a prisoner in the *Fleet*, was prevailed on to accept it; and *Nash* in consideration of 5 s. (which it appeared he lent her for that purpose) made a formal assignment. The defendant insisting that this was not proper evidence on *non assignavit*, but that the plaintiff should have replied *per fraudem*; the Chief Justice held, it could not be gone into on this issue, according to the case in *Hob.* 72, 166 (1). The plaintiff became nonsuit.

Bull. L. N. P. 159.

And now a new action being brought, and fraud replied; it was debated, whether this was to be considered as fraudulent or not: and the Chief Justice directed the jury to find for the defendant. He said the defendant could not be charged upon the privity of estate, which was destroyed as against him by the legal assignment to *Reed;* and it was the folly of the plaintiff to discharge the original lessee: that *Reed*'s being a beggar did not alter the case, as was said in *Pitcher* v. *Tovey*, *Salk.* 81. 4 *Mod.* 71. (a) He grounded his opinion chiefly on two modern cases in Chancery, where this had been determined to be no fraud. The first was *Valliant* v. *Dodimead* (b), 2 *May* 16 *Geo.* 2. and *Huddle* v. *Hawkſby* (c), 4 *February* 1744. upon the foot that an as-

(a) 2 Vent. 234. 3 Lev. 295. 1 Show. 340. Carth. 177. 12 Mod. 2[illegible]. Holt 73. S. C.

(b) 2 Atk. 546.

(c) It appears by the minutes taken of the decree in this cause, that the plaintiff's bill was to have an account of the rents and satisfaction for damages; and to have the assignment of the lease delivered up or set aside, which the court dismissed, but without costs, and the plaintiff ordered to deliver up the bond for performance of covenants in the lease to the defendant, given to him by a third person, which was accordingly done in court. Note to 2d. Edition.

(1) *Vide Anon.* 1 *Vent.* 329—331. *Walker* v. *Reeves*, *Doug.* 361. n. [1.]

ſignee ought not to be chargeable any longer than he occupies the premiſſes.

This being merely a point of law, the Chief Juſtice told the jury, they muſt find for the defendant: which they were very unwilling to do, and therefore to prevent their going contrary to his opinion, I ſuffered a nonſuit.

[1222]

Dominus Rex *verſ.* Coningſby et al'.

The ſeſſions of particular liberties have the determination of appeals about the poor, and not the county ſeſſions.

THE accounts of the overſeers of *Watford* in *Hertfordſhire* having been allowed by two juſtices of the peace, an appeal was lodged at the county ſeſſions, which the juſtices of the peace there refuſed to proceed upon, being of opinion, that as *Watford* was within the liberty of St. *Alban's*, the appeal ought to have been to the liberty ſeſſions. Upon this a *mandamus* was moved for, requiring the county juſtices of the peace to proceed. And it was inſiſted on, that by the 43 *Eliz.* *c.* 2. all appeals muſt be to the county ſeſſions: and if the liberty could have juriſdiction, it would at moſt be only a concurrent one, and the appeal might be to either at the election of the party. But upon ſhewing cauſe the rule was diſcharged, upon an affidavit that in fact the juſtices of the peace of the liberty do as ſuch conſtantly appoint the overſeers, and determine about them at their ſeſſions, without one inſtance to the contrary; which the court ſaid, was to be conſidered as explanatory of the general words in the 43 *Eliz.* and is now confirmed by the 17 *Geo.* 2. *c.* 38. which mentions diviſions and franchiſes who have four juſtices, and here are many more.

Creſſy *verſ.* Webb et al'.

Damages aſſeſſed againſt defaulters though the defendants pleading to iſſue are acquitted. Ante 507, 1108. (1)

WEBB only pleaded to iſſue, the other defendants let judgment go by default. And it came on at *Guildhall* to try the iſſue, and alſo to aſſeſs the damages as to the others. On the trial *Webb* was acquitted: and a doubt aroſe, whether the plaintiff could go on: but the Chief Juſtice thought he might proceed, and he did ſo.

(1) *Bull. L. N. P.* 20.

[1223]

Dominus Rex *verſ.* the Fraternity of Hoſtmen in Newcaſtle-upon-Tyne.

Where books of a corporation may be inſpected on diſputes to which they are no parties.

A *Mandamus* was granted, to admit a perſon into this company: and by the return it appeared to be a queſtion, whether the maſter he ſerved had been admitted to his freedom in the corporation at large: whereupon he moved for a general rule to inſpect the books of the corporation. I oppoſed this on behalf

behalf of the corporation, as they were no parties to the dispute: and cited the cases of *Cobb* v. *Oldfield*, (*Hil.* 4 *Geo.* 1.) and *Shelling* v. *Farmer*, (*ante* 646.) *Crew* v. *Saunders*, (*ante* 1005.) and the case of Dr. *Bridgeman*, (*ante* 1203). But the court said, that every member of the corporation had, as such, a right to look into the books for any matter that concerned himself, though it was in a dispute with others. And the return having pointed out the necessity of inspecting them for a particular purpose, they would assist him with a rule; but it should be confined to the book wherein admissions of freemen are entered (1).

(1) The liberty given to inspect and take copies of books and other instruments, which are of right in the care of other persons, is grounded either upon a motion for a *mandamus* to that effect, or upon one made in an existing suit, and founded on the supposition that the matters therein contained are necessary to the attainment of justice between the parties to the action. Instances of motions of this last kind are much more frequently to be met with in our reports than of the former. It is the intention of the present note therefore to treat principally of them, pointing out incidentally how and where the application by *mandamus* seems to differ from them, either in the grounds upon which, or the extent to which it is to be obtained. In the case of existing actions these motions seem to have been first introduced with respect to court rolls, *vide Crew qui tam* v. *Saunders*, *ante* 1005. and the principle which induced the court to grant them there, seems to regulate their discretion in most instances to which they have hitherto extended the rule: namely, such instruments as are *the common evidence* of several persons placed in the hands of one custodee for the benefit of all those who have this interest in them as being the evidence of their rights. This principle appears to apply also to motions for a *mandamus*, except that perhaps a degree of ownership must appear more strong and positive to the court there, in order to entitle the party to the effect of his application. The various cases to be found in the books in which the court have granted these rules depend in a great measure upon their peculiar circumstances, but they may, with perhaps a few exceptions, where the cases seem contradictory, be reduced under these four heads. First, Such documents of *public* proceedings as are lodged in the custody of public officers for the public use. These (at least in general) every subject has a right to inspect without shewing in his affidavit whether they relate directly to the point in question or not. *Herbert* v. *Ashburner*, 1 *Wils.* 297. *Rex* v. *Barking*, cited 1 *Wils.* 240. 1 *Black. Rep.* 39. *S. C. Rex* v. *King*, 2 *Term Rep.* 234. and see *Moody* v. *Thurston*, *ante* 304. But in some instances the court will not grant a copy of such instruments where it is contrary to public policy. Thus a copy of an indictment will be refused to the person indicted and acquitted, if there appear to have been a probable cause for the accusation, *Groenvelt* v. *Burrell*, 1 *Lord Raym.* 253. *Carth.* 421. S. C. *Jordan* v. *Lewis*, *ante* 1122. Secondly, Such books, &c. as are the common property of aggregate bodies acknowledged as such by our law, in which every

every member has an intereft as being the evidence of fome property or franchife having vefted in him, or of his having conducted himfelf in the exercife of that franchife correctly. Such are corporation books with refpect to corporators. *Slade* v. *Walter*, 12 *Vin. Abr.* 146. *pl.* 8. *Rex* v. *Littleton & al'*, *Ib.* 147. *pl.* 13. *Geary* v. *Hopkins*, 2 *Ld Raym.* 851. 7 *Mod.* 127. S. C. *Richards qui tam* v. *Pattinfon*, *Barnes* 235. *Com. Rep.* 555. S. C. *Rex* v. *Hollifter*, *Caf. Temp. Hard.* 245. *Warrener* v. *Giles*, *ante* 954. *Dr. Young* v. *Dr. Lynch*, 1 *Black. Rep.* 27. *Dr. Bentley* v. *Bifhop of Ely*, 1 *Barnard. B. R.* 193. The rolls of copyhold courts and of courts baron, with regard to their refpective fuitors. *Roe* v. *Aylmar*, *Barnes* 236. *Hobfon* v. *Parker*, *Baldwyn* v. *Tudge*, *Ib.* 237. *Addington* v. *Clode*, 2 *Black.* 1030. *Folkard* v *Hemet*, *Ib.* 1061. *Rex* v. *Shelley*, 3 *Term Rep.* 141. So alfo parifh books, *Cox* v. *Copping*, 5 *Mod.* 395, &c. But the court will only grant the rule under the following circumftances: 1ft, The party applying muft be a member of that body or tenant of that manor of whofe books he feeks the infpection. *Vide Hodges* v. *Atkis*, 3 *Wilf.* 398. 2 *Black.* 877. *S. C. Mayor, &c. of Exeter* v. *Coleman*, *Barnes* 238. *Anon.* 2 *Vez* 620. *Shelling* v. *Farmer*, *ante* 646. *Murray* v. *Thornhill*, *ante* 717. *Rex* v. *Doctor Bridgman*, *ante* 1203. *Allan* v. *Tap*, 2 *Black. Rep.* 850. *Wood* v. *Whitcomb.* 12 *Vin. Abr.* 146. *pl.* 9. *Lewis* v. *Baker*, 1 *Barnard. B. R.* 100 *College of Phyficians* v. *Doctor Weft*, *Gilb. Rep. B. R.* 134. *Bifhop of Hereford* v. *Duke of Bridgewater*, *Bunb.* 269 *Smith* v. *Davis*, 1 *Wilf.* 104. *Talbot* v. *Villiers*, cited 3 *Term Rep.* 142. *Cox* v *Copping*, 5 *Mod.* 395. 1 *Ld. Raym.* 337. *Turner* v. *Gethin*, 12 *Vin.* 147. *pl.* 11. But in *Mayor of Lynn* v. *Denton*, 1 *Term Rep* 689. *Corporation of Barnftaple* v. *Lathey*, 3 *Term Rep.* 303. *in B. R. Mayor, &c. of London* v. *Mayor, &c. of Lynn*, 1 *H. Black.* 211. *in C. B.* the court feems to have over-ruled the cafes of *Hodges* v. *Atkis*, 3 *Wilf.* 398. and *Mayor, &c. of Exeter* v. *Coleman*, *Barnes* 238, and to have held that in fuch actions as are brought to fupport claims of duties made by corporations upon the public, of the validity of which the beft evidence muft be in the documents of the corporation, and of which documents equity would grant an infpection; Such for inftance, as claims of *tolls*, that in thefe cafes individuals who are interefted to difpute their claims have an intereft in the books which will intitle them upon motion to an infpection of the entries relating to the fubject matter of the litigation. But thefe determinations feem to carry the rule no further than cafes of this fort even in difputes between the corporation and ftrangers. And they do not decide that ftrangers have a general right fimilar to to that which members of the corporation enjoy, *viz.* to infpect the books in actions between them and third perfons. Or, 2d. if the parties applying be not members, fuch books muft be the common evidence of the tranfactions between them and it, fo as in fact to be for this purpofe the books of both. Such are the cafes of entries in the Cuftom-houfe books, of the India Company and Bank ftock, and transfer books. *Geary* v. *Hopkins*, 2 *Ld. Raym.* 851. *Warriner* v. *Giles*, 954 *Crew qui tam* v. *Saunders*, *ante* 1005. But I have met with no inftance of a *mandamus* to compel the infpection of books of this kind. 3d. The evidence contained in them, muft be directly material in the caufe, and the party applying fhall

 only

only have the infpection and copying of fuch things as relate to himfelf. *Benfon* v. *Pott*, *Mich.* 22 *Geo.* 2. cited 1 *Wilf.* 240. 1 *Black. Rep.* 40. S. C. *Mayor of London* v. *Swinland*, 1 *Barnard. B. R.* 455, *Crew qui tam* v. *Saunders*, *ut fupra*, and this though a corporator, *Rex* v. *Babb*, 3 *Term Rep.* 581. and the prefent cafe. It does not feem fettled how far corporators have a right to apply for a *mandamus* for a general infpection and copying of the books of the corporation. *Vide Rex* v. *G. Babb*, 3 *Term Rep.* 579. But tenants of a manor have this right as to the court rolls, &c. *Rex* v. *Shelly*, 3 *Term Rep* 141. As to the ftage of the caufe, in which the court will grant the motion, as being enabled to judge whether an infpection is material, *vide Groenvoelt* v. *Burrell*, 1 *Lord Raym.* 253. *Hodges* v. *Atkis*, 2 *Black.* 877. *Rex* v. *Hollifter*, *Ca. temp. Hard.* 245. *Rex* v. *Juftices of Surry*, *Say.* 145. *Rex* v. *G. Babb*, 3 *Term Rep.* 579. 4th, The court will not oblige the cuftodees of fuch books to give the profecutor an infpection and copy of things neceffary to fupport a criminal profecution, *Rex* v. *Worfenham*, 1 *Ld. Raym.* 705. *Crew qui tam* v. *Saunders*, *ante* 1005. *Rex* v. *Cornelius*, *ante* 1210. *Regina* v. *Mead*, 2 *Ld. Raym.* 927. *Rex* v. *Doctor Purnell*, 1 *Wilf.* 329. 1 *Black. Rep.* 37. S. C. *Rex* v. *Lee*, cited *Ib.* *Bradfhaw* v. *Philips*, cited *Ib.* 39. *Rex* v. *Heydon*, 1 *Black. Rep.* 351. *Roe* v. *Harvey*, 4 *Burr.* 2489. The court however will grant fuch a rule to the relator in an information, in the nature of a *quo warranto*, if he be a member of the corporation, for it is in the nature of a civil proceeding, *Rex* v. *Shelley*, 3 *Term Rep.* 141. But I have not been able to meet with any cafe exprefsly deciding that even a partial infpection fhall be permitted to a relator who is not fo. The reafoning of the judges however in *Rex* v. *G. Babb*, 3 *Term Rep.* 581. feems to take it for granted that he has fuch right. And this is perhaps founded, as well upon the principle that thefe books may contain the only evidence upon the queftion, as alfo becaufe the crown is not merely nominally, but materially concerned in the profecution, fince every intrufion into a corporate body is an ufurpation upon the prerogative, and the king as the head and origin, is to be confidered as a member of all lay corporations. Thirdly, It feems the court will grant this rule, when an inftrument of which it is not ufual to have a counterpart, is lodged in the hands of a private perfon, as a general and common *cuftodee* for the parties interefted in it, and that though the action is brought againft himfelf, *Gracewood* v. —— *Barnes* 439. *Goater* v. *Nunnely*, *ante* 1130. *Sed vide Wood* v. *Apprice*, 6 *Mod.* 264. *Stock* v. *Bell*, 1 *Barnard B. R.* 466. Fourthly, Every perfon has a right to a copy of thofe proceedings of limited jurifdictions which are had againft himfelf, where it is neceffary in a fuit inftituted either by or againft him. *Rex* v. *Smith*, *ante* 126. 12 *Vin.* 194. *pl.* 68. S. C. *Brewers' Company* v. *Benfon*, *Barnes* 236. This feems limited by fome decifions to cafes where the cuftodees of the books are parties to the action. *Groenvoelt* v. *Burrell*, 1 *Ld Raym.* 252. *Salk.* 144. *S. C.* *Aberry* v. *Dickenfon*. *Say. Rep.* 250. but *Watfon* v. *Rogers*, *poft.* 1242. *Edwards* v. *Vefey*, *And.* 128. make no fuch diftinction. But the books of a private company cannot be infpected any more than thofe of a private individual, *Smith* v. *Huggins*, *Barnes* 236. *Regina* v. *Mead ut fupra*. *Charitable Corporation* v. *Woodcroft*, *Caf. temp. Hard.* 130.

Easter Term

18 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Martin Wright, *Esq*;
Thomas Denison, *Esq*; } *Justices*,
Sir Michael Foster, *Knt.*

Sir Dudley Ryder, *Knt. Attorney General.*

The Hon. William Murray, *Solicitor General.*

4 Beav 134.

Wilkes *verf.* Broadbent.

If any part of a custom as laid be unreasonable, the whole will be void. 1 Wils. 63. S. C.

ERROR of a judgment *in Communi Banco*, where in trespass the defendant justified under a custom, that when the lord of the manor of *Halton*, or his tenants of the collieries, have sunk pits within the freehold lands, for working them, they have used time out of mind to throw the earth, stones, coals, &c. coming therefrom together in heaps on the land near such pits, such land being customary tenement and parcel of the manor, there to remain and continue; and to lay and continue wood there for the necessary use of the pits; and to take and carry away in carts, &c. part of the coals laid there, and to burn and make into cinders other part of the coals so laid there, at his and their free wills and pleasures. And issue being joined on the custom, there was a verdict for the defendant. But the court of Common Pleas being of opinion, it was a void custom, as laid, gave judgment for the plaintiff upon the in-

sufficiency

sufficiency of the bar (1); and a trespass being thereby acknowledged, whereon a writ of inquiry issued, he had final judgment for his damages and costs.

And after several arguments *in Banco Regis*, the Chief Justice delivered the resolution of the court for affirming the judgment.

The question he said was, whether this was a reasonable *lex loci*; which they held it not to be, inasmuch as it laid a great burden upon the land of the plaintiff, without any consideration appearing, either publick or private. That it savoured of an arbitrary power, and might (as laid) put it in the power of the lord, totally to deprive the tenant of the benefit of the land, there being no restriction in time, and the word *near* was too vague and uncertain. And though many cases were cited out of *Davis* 32 *b.* as turning the plow on another's land, coming there to dry nets, erecting light-houses, blowing up houses, and the like; yet those were all cases of necessity, and single points; whereas here it consists of great variety, some of which are not necessary, particularly that of burning cinders: and if any part of the custom be bad, it avoids the whole. 4 *Co.* 21. 2 *Ric.* 2, 3. 1 *Roll. Abr.* 560. *pl.* 1. 21 *Ed.* 4. 8. *b. Litt.* § 212. *Litt. Rep.* 233. *Het.* 126. *Hutt.* 101. *Palm.* 212. 1 *Leon.* 11. 2 *Roll. Abr.* 266. the case of claiming a warren in all the lands, held ill.

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(1) It was also made a question whether the judgment was rightly given upon the plea and not upon the verdict; and it was held that it was rightly entered, *Carth.* 272 or 307. 27 *Ed.* 4. *Bar. fo.* 462. *Roll. Abr.* 99. were cited. 1 *Wils.* 65.

Between the Parishes of Sheepshead in Leicestershire *and* Melborne in Derbyshire.

Officiating as school-master and receiving 10 *l. per ann.* does not gain a settlement. Burr. Sett. Cas. 244. and 1 Wils. Rep. 87, S. C.

A Person was certificated from *Sheepshead* to *Melborne*, and stayed there ten years; during which time the Lady *Elizabeth Hastings* conveyed lands to trustees for several charities out of the profits, and (*inter alia*) the sum of 10 *l. per annum* to the charity-school at *Melborne*, to be paid to the vicar there for the time being. In a special order of sessions it was stated, that the certificate-man officiated as school-master several years, and received the 10 *l. per annum* from the vicar: and this the sessions held gained him a settlement in *Melborne*, where they declare he had a freehold estate.

Et

Et per curiam, The order must be quashed: for it does not appear how he came into this employment, and the legal right to receive the salary is in the vicar, who not caring to officiate himself, has therefore paid it over to this man as his deputy; which could never give any person a settlement, much less to a certificate-man (1).

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(1) In the other reports it is stated that a schoolmaster is not an annual office.

[1226]

Wightman *verf.* Mullens.

In escape it must appear the commitment is of record.

IN an action against the marshal for an escape, it was laid, that the prisoner being brought before Sir *William Chapple*, one of the Justices of our Lord the King, at his chambers in *Serjeant's-Inn*, was there committed to the custody of the marshal at the suit of the plaintiff, as by the said commitment may more at large appear.

One of the king's justices does not import a judge of *B. R.* Ante 1180.

To this the defendant demurred, and shewed for cause, that it did not appear the commitment was of record. And on argument the court held it ill; for he is not in point of law in the marshal's custody, till the commitment is entered on record; nor can the court take notice that Sir *William Chapple* had any power to commit him, he being only stiled one of the justices of the King, which every common justice of the peace is.

Claphamson *verf.* Bowman.

As he believes, is not sufficient for bail. Ante 1157, 1209.

THE plaintiff's book-keeper swore, that the defendant was indebted to the plaintiff in 3,400 *l.* for money had and received by the defendant to the use of the plaintiff, *as this deponent verily believes*. And the court held it not sufficient, to hold the defendant to special bail.

Dominus Rex *verf.* Freeman.

In an indictment for a rescue it must appear for what the party was committed to the house of correction. 2 Hawk. P. C. c. 23. f. 57. p. 320.

THE defendant was convicted, for that the keeper of the house of correction having *A.* in his custody, who was committed by virtue of a justice of peace's warrant, the defendant unlawfully rescued him: and the court arrested the judgment, it not being shewn for what *A.* was committed, so as to make the house of correction a proper prison (which *prima facie* it is not for all offences) and also because the court cannot judge of a proper punishment on so general a charge.

Sir Watkin Williams Wynne, Baronet, *verf.* William Middleton, Esq.

THIS was an action on the ftatute 7 & 8 *W.* 3. *c.* 7. against the defendant as fheriff of *Denbighfhire* for a falfe return on an election for a knight of the fhire, in which the plaintiff recovered his double damages and cofts: of which judgment error was brought. And now the plaintiff moved to amend, by adding a continuance, and a *mifericordia*; the want whereof it was apprehended would not be aided, if this was deemed a penal ftatute. It was for that reafon oppofed, actions upon penal ftatutes being excepted out of the ftatutes of jeofails. *Sed per curiam*, There is nothing excepted out of the ftatute 8 *Hen.* 6. *c.* 12. (which is properly a ftatute of amendment,) but appeals and indictments of treafon and felony. And in a cafe of this fort, *Trin.* 1 *Geo.* 1. *in Banco Regis*, *Phillips* v. *Smith*, amendments were made: the plaintiff therefore is at liberty to affign errors *de novo* (1).

Amendment. 1 Wilf. 125. S.C. in Cam. Scac.

Vide Cowp. 387. 392. Ante 843. Ante 136. 734.

(1) *Anon. B. R.* 1 *Wilf.* 256. *Vide* alfo in *Bennet qui tam* v. *Smith*, 1 *Burr.* 402.

Dominus Rex *verf.* Elizabeth Niccolls.

SHE was indicted at *Hicks's Hall*, for confpiring with *Edward Bygrave*, unjuftly to charge *William Frankland* with a robbery, and for that purpofe going before a juftice of peace, where *Bygrave* fwore it upon him; *Niccolls* only came in and pleaded Not guilty. And the jury found that fhe was guilty, but that *Bygrave* died before the indictment was preferred. Before any judgment was given at the feffions, fhe brought a *certiorari*, and the caufe was fet down to be argued.

One confpirator may be convicted after the other is dead.

The firft thing determined was, that this being in the nature of a fpecial verdict, that there was no occafion for the defendant's appearing in court upon the argument: for fhe is not confidered as convicted, till after the court have determined upon the verdict. And it was therefore not within the reafon of the cafe of moving for a new trial, or in arreft of judgment; where there being a general verdict, it created fuch a prefumption of guilt, that the party cannot move without being prefent in court.

It then came on upon the merits; when exception was taken, that one alone cannot be guilty of a confpiracy, and here is but one convicted: but the court over-ruled this, on the authority of

of *Kinnersley*'s case, (*ante* 193.) where judgment was given against him before the other had pleaded; so that there was a possibility of contradictory verdicts, which cannot be here. And I cited 1 *Vent.* 234. 24 *Ed.* 3. 34. *b.* 24 *Ed.* 3. 73. *a.* in point (1).

A verdict cannot be removed from the sessions before judgment. (2).

But then a doubt arose, what the court could do, the *certiorari* being brought before judgment: and this court not being apprized of the circumstances of the offence, could not tell what judgment to give: and in *Carth.* 6. it is said, they cannot give judgment. A rule therefore was made, to shew cause why the *certiorari* should not be quashed, so as to remit it back to the sessions; which was afterwards made absolute.

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(1) *Vide* also *Rex* v. *Scott*, 3 *Burr.* 1262. S. P. upon an indictment for a riot.

(2) *Vide Rex* v. *Gwinne*, 2 *Burr.* 749. *Rex* v. *Elwell*, *ante* 794.

Sargent *vers.* Reed.

Prescription to take three bushels out of every ship's cargo of barley for keyage is good. 1 Wilf. 91. S. C. The prescription in a MSS report omits the words in capitals, in other respects it corresponds, but the report in Wilf. agrees with the present one.

TRESPASS for taking three bushels of barley; the defendant pleads, That *Richard Daniel* being seised in fee of the manor of *Penzance*, of which the pier or key was parcel, he and all those whose estate he had, at their own costs had used and ought to repair it, and had of right taken a reasonable duty called *Bushelage*, (*viz.*) three WINCHESTER bushels of barley OUT OF AND *for every ship's cargo of barley brought upon the said key to be exported* IN ANY SHIP; and that he by bargain and sale, *for the considerations therein mentioned*, sold it to the corporation of *Penzance*, to hold to them and their successors in fee farm for ever, by virtue whereof they became and yet are seised of the premisses in their demesne as of fee: then he shews, that the plaintiff brought upon the key a cargo of barley, consisting of 1200 *Winchester* bushels, out of which he as servant of the corporation, and by their command, took the three bushels as by law he might. The plaintiff by his replication denies the prescription: and issue being joined, it went down to trial, and there was a verdict for the defendant.

It was now moved in arrest of judgment, that the prescription was unreasonable and uncertain, the word *cargo* being too general; and three bushels out of a small parcel, as well as a large one, not being a reasonable proportion. And 2 *Lev.* 96. *Raym.* 433. were cited.

To

To this it was anfwered, and refolved by the court, that the word *cargo* as referred to a fhip, was very intelligible, and muft mean the whole loading. It may as well be faid that the word *fhip* is uncertain, one being much bigger than another; and there are many cafes where words as general have been allowed. 4 *Mod.* 319. *Stil.* 224, 358. 1 *Vent.* 114. 1 *Sid.* 98. *Cro.* [1229] *Jac.* 307. 1 *Bulft.* 126. 2 *Vent.* 67, 78. 2 *Sid.* 174. *Lutw.* 1519. *Hob.* 85.

Pleading a bargain and fale without fhewing it to be for a valuable confideration will be ill upon demurrer, but cured by verdict or taking iffue on a collateral fact.

Another exception taken, was to the manner of fetting out the title of the corporation, the bargain and fale being only faid to be for the confiderations therein mentioned, whereas it ought to appear to have been for a *money*, or *valuable* confideration, according to 1 *Leo.* 170. *Mo.* 569. 1 *Co. Mildmay's* cafe. 3 *Lev.* 233.

To this it was anfwered, that the cafes cited were upon demurrer; but this is after a verdict, when it being laid, that *virtute inde* the corporation was feifed, the court muft take it, that there was a proper confideration: befides, it is laid to be *in fee-farm*, which imports the payment of money: and 27 *Hen.* 8. *c.* 16. doth not require a money confideration. In *Mo.* 504. it is faid, that it fhall be implied in pleading, unlefs the contrary appears: and though the verdict is upon the prefcription, and not on the conveyance; yet it is as ftrong againft the plaintiff, being in the nature of a *nient dedire.*

The court feemed to think this way of pleading it would be ill upon a demurrer (1), but was now cured; it not being a defective title, but a title defectively fet out, according to *Salk.* 365, (2) And the rule to fhew caufe was difcharged.

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(1) That is a fpecial demurrer, *Vide Bolton* v. *Bifhop of Carlifle*, 2 *H. Black.* 261.

(2) *Stream* v. *Seyer*, 1 *Lord Raym.* 111. S. P. *Vide Bolton* v. *Bifhop of Carlifle, ut fupra.*

Dominus Rex *verf.* Thomas Broughton.

Party fuppofed to be defrauded allowed a witnefs in perjury.

No conviction for perjury on the oath of a fingle witnefs.

ON an indictment for perjury, the cafe appeared to be, that one *Wharram* employed the defendant's brother *James* to fell an eftate for him that lay at a diftance, whom *Wharram* charged to have funk 700 *l.* of the purchafe money, and filed a bill, and obtained a decree for an account, upon the foot of an impofition: after this *James Broughton*, pretending to have found a written account, wherein he had given *Wharram* credit for the 700 *l.* reheard the caufe, and examined the defendant,

fendant, who swore that the account was sent to him by his brother into *Yorkshire* to shew *Wharram*, which he did: and *Wharram* owned it to be his hand, and declared he had forgot it. The Chancellor was of opinion, this account was a forgery; and therefore did not vary his decree: but recommended the prosecution of *James*, who thereupon ran away: *Wharram* then indicted the defendant for perjury, and offered himself as a
[1230] witness; which I opposed, on the authority of *Dominus Rex* v. *Nunez*, (*ante* 1043.) and *Dominus Rex* v. *Ellis*, (*ante* 1104.) and the case of *The King* v. *Whiting* in *Salk.* 283.

The Chief Justice declared, he was for hearing the evidence of *Wharram*, because as no bill of exceptions would lie, the prosecutor would otherwise be without remedy, whereas the defendant if convicted might move for a new trial: but he said he would give no opinion at present, further than observing, that in *Nunez*'s case the suit in the Exchequer was then depending, whereas the suit here in Equity seemed to be at an end (1).

Whereupon *Wharram* was examined, and contradicted the defendant in all the parts of his examination; but being only a single witness on the point of the perjury, I insisted, there was no occasion to go into our defence. And the Chief Justice being of that opinion, the defendant was acquitted (2).

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(1) *Vide Wells*'s case, *Buller's L. N. P.* 289. *Rex* v. *Ellis*, *ante* 1104, and the note. But in an indictment for perjury, Ld. *Kenyon* C. J. held, that the defendant in the original action against whom the verdict went was an incompetent witness, he not having paid the debt and costs. *Rex* v. *Eden*. *Hil.* 34 *Geo.* 3. *Espinasse*'s Ca. at *Ni. Pri.* 97.

(2) *Regina* v. *Muscot*, 10 *Mod.* 194. acc.

Trinity Term

18 Georgii 2. Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*
Martin Wright, *Esq;*
Thomas Denison, *Esq;* } *Justices.*
Sir Michael Foster, *Knt.*
Sir Dudley Ryder, *Knt. Attorney General.*
The Hon. William Murray, *Solicitor General.*

Dominus Rex *vers.* Bambridge.

A Woman exhibited articles of the peace, stiling herself the wife of the defendant, setting out acts of cruelty, and the peudency of a suit in the ecclesiastical court for restitution of conjugal rights. The defendant coming to put in bail, insisted the recognizance should not be taken so as to carry any admission of the marriage. And the court ordered it should run thus, "To keep the peace towards our Sovereign Lord the King, "and all his liege people, and particularly towards *Hannah* "*Penn*, who hath exhibited articles of the peace against him "the said *James Bambridge*, by the name of *Hannah Bambridge* "wife of him the said *James*, and that he shall not depart the "court without leave, *&c.*"

How to take security of the peace where a marriage is disputed.

Walker *verf.* Robinfon.

Certificate on 44 Eliz. againft cofts (1). 1 Wilf. 93.. S. C. more full.]

IN trefpafs for an affault and taking a rope, the jury gave 18*d.* damages. And Mr. Juftice *Burnet*, who tried the caufe, certified his approbation of the verdict, according to 43 *Eliz. c.* 6. in order to prevent cofts. The plaintiff however moved (as it was a new cafe) for cofts *de incremento*, pretending here was an afportation, which on 22 & 23 *Car.* 2. *c.* 9. has been always held to carry cofts. But the court in this cafe refufed it, for the 43 *Eliz.* takes in all but a few excepted cafes, of which this is not one. And though it has not been ufual to grant a certificate on this act, yet we have often known it threatened. And in the cafe of *White* v. *Smith in C. B. Pafch.* 17 *Geo.* 2. Chief Juftice *Willes*, in an action for taking fand on *Hounflow-heath*, did certify, and prevented cofts.

(1) *Vide Howard* v. *Chefhire*, 2 *Wilf.* 258. *Dand* v. *Sexton*, 3 *Say. Rep.* 250. *Bartlet* v. *Robins*, *Term Rep.* 37.

Between the Parifhes of Saint Peter in Sandwich *and* Goolafton in Kent.

Servant going to fea with his mafter's leave, and finding another to do his work, is fettled. Burr. Sett. Ca. 251. S. C.

A Servant was hired for a year, during which he, with his mafter's leave, went to fea upon the herring fifhery, but hired another to do his work in the mean time: he returned at the end of three weeks after the expiration of his year, fettled with his mafter, and received his whole year's wages.

This the Seffions held was not a fervice for a year; but the court, on the authority of the cafe of *Iflip* (*ante* 423.) and *Beccles* v. *Leoftoff*, (*ante* 1207.) held it a fettlement; faying he was to be confidered all the while as in the fervice of his mafter (1), and the perfon he found to do his work was his fervant, and not the mafter's: wherefore the order was quafhed.

(1) *Rex* v. *Ivinghoe*, *ante* 92. *S. P. per Pratt* C. J.

The Weavers' Company, qui tam, *verf.* Forreft.

May declare *qui tam* tho' the procefs is not fo. Poft. 1241.

A Bill of *Middlefex* was, to anfwer to the Weavers' Company: and the declaration was in the name of the company, *qui tam* for themfelves and the poor of a parifh where the offence was committed: it was moved therefore to ftay the proceedings, becaufe the declaration differed from the procefs; but the court held

held it right, it not being usual to insert in the bill of *Middlesex* on what account or in what right the party sues, as in the case of executors and administrators, the case of an assignee of a bail-bond, and the like, where the process is only *ad respondendum* to *A. B.* (1).

[1233]
English notice on process need not express the year (2).

Then exception was taken to the notice at the bottom of the process, which was only to appear at the return thereof, being the 14th of *June* without saying this instant, or expressing the year of our Lord, or of the King: but the court said, it must be understood the next 14th of *June*, and held it right.

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(1) *Lloyd* v. *Williams*, 2 *Black.* 722. 3 *Wils.* 141. *S. P. in C. B.* But it would have been otherwise if the process had been to answer the plaintiff *qui tam*, &c. and the declaration had been in his own name, *Canning* v. *Davis*, *B. R.* 4 *Burr.* 2417. *Canning* v. *Davis*, *S. P. in C. B. Barnes* 494. *Meggs Assignee* v. *Ford*. *E.* 25 *Geo.* 3. *Imp. Prac. K. B.* 172. *Vide* also *Turing* v. *Jones*, 5 *Term Rep.* 402.

(2) *Wingfield* v. *Beard*, *Barnes* 419. *White* v. *Washington*, *Prac. Reg.* 347, are contra as to the practice in *C. B.* But a latter determination in *Elliot* v. *Parrot*, *Barnes* 225, overrules these cases, and agrees with the present decision.

Between the Parishes of Maidstone *and* * Hedcome in Kent.

* Should be Headcorn. Burr. Settl. Caf. 253. pl. 86. note to 2d Ed.

Certificate conclusive to the parish that gives it.

Burr. Sett. Ca. 251. 233. and Sess. Ca. Ed. 1750. vol. 2. p. 591. No. 206. S. C.

MAIDSTONE certificated *Richard Burden* and *Mary* his wife, who came therewith into *Hedcome*, and had four children. And upon his becoming actually chargeable, they were all sent back to *Maidstone* by an order of two justices of the peace.

Upon appeal to the sessions, it was stated, that the man in 1715. lawfully intermarried with *Mary Lee*, who then appeared in court, and by whom he had several children, who were all maintained at *Maidstone*, as the wife and children. That in 1730. he (in fact) married *Mary Bromhall*, who was the woman that removed with him to *Hedcome*, and is the same that was now sent back to *Maidstone*; but the sessions considering they were both called *Mary*, and that *Maidstone* actually maintains *Mary* the real wife, and all her children; were of opinion, the others were not to be sent back to *Maidstone*; and therefore confirmed the order of the two justices as to the man, and quashed it as to the woman and the children of the second marriage.

And now on debate in *B. R.* it was held, that the two justices of the peace had done right in sending them all back to *Maidstone*, for the certificate is conclusive to *Maidstone*: and upon the fact stated, it does sufficiently appear, what *Mary* it was that was meant by the certificate: and that this case did not differ from that of *New Windsor* and *White Waltham* (*ante* 186.) nor did it alter the case, that *Maidstone* had the real wife and children to maintain also: they therefore confirmed the order of
[1234] sessions as to the man, quashed it as to the rest, and confirmed the order of the two justices of the peace *in toto*.

Turner *vers.* Schomberg.

Where common bail. Ante 1218. * 16 G. 2. c. 17. s. 18. † See Barnes 81, 82 on 11 G. 2. c. 9. n. to 2d Ed.

THE defendant gave his note for 36 *l.* He was afterwards discharged on the insolvent debtors act*: afterwards meeting the plaintiff, he promised to pay the debt at two guineas *per* month, and paid twelve guineas accordingly. And being now sued for † the rest, the court discharged him on common bail, saying it was no new consideration, but the old debt (1).

(1) S. P. Where a promise was made subsequent to bankruptcy, and the debt prior. *Baily* v. *Dillon*, 2 *Burr.* 736.

Webb *vers.* Holt.

Practice as to pleading as will stand by.

THE defendant pleading a sham plea; the plaintiff obtained the common rule, that the defendant should plead peremptorily on the morrow, and that such plea shall not be waived; and served it on the defendant's attorney, who taking no notice of it, the plaintiff after the day was out, signed judgment: which the court on the master's report held to be irregular, the first plea standing, if the defendant did not lay hold of the opportunity given him of altering it, whereby the plaintiff has the benefit of his motion.

Dominus Rex *vers.* Hendricks.

B. R. will not grant information for usury after the suit is lapsed to the crown. MSS. S. C.

BY 12 *Ann. c.* 16. the treble value is recoverable on an usurious contract, one moiety to the crown, and the other to him that will sue for the same. By 31 *Eliz. c.* 5. *s.* 5. the common informer is limited to a year after the offence committed, and if no such suit is brought within the year, then the crown may sue at any time within two years after the end of the first year.

In

In this cafe the year was expired; but within the other two years, I moved upon proper affidavits, for an information, and obtained a rule to fhew caufe: but the court afterwards difcharged it, being of opinion, that it was a matter left to the difcretion of the crown, which the court had not power to exercife: and there never was an inftance, where for a penalty vefted in the crown only, this court ever granted an information; but they are always filed by the Attorney General, who is the proper officer in thofe cafes.

Marfh et al', Affignees of May a Bankrupt, *verf.* Chambers.

IN *affumpfit* the defendant was proved to be indebted to the bankrupt in 208*l.* By a fet off, and bringing money into court, this whole demand would be difcharged, if the defendant was intitled to be allowed 127*l.* upon a note of the bankrupt's, which he claimed as indorfee, the cafe as to which was thus:

Note indorfed to a debtor of a bankrupt after the bankruptcy cannot be fet off.
Tri. at N. Pri. 167.

One *Scott* who was poffeffed of this note at the time of the bankruptcy, applied to the defendant, who he knew owed more money to the bankrupt's eftate, defiring him to take the note and claim a credit for it, on fettling with the affignees, according to 5 *Geo.* 2. *c.* 30. The defendant fcrupled it, and the bankrupt would not confent; but at laft the defendant ventured, upon *Scott*'s indorfement (who he faid was a good man) to pay the 127*l.* and upon notice to fet off, produced the note. I oppofed its being allowed, it appearing to be an indorfement *after* the bankruptcy, whereas the words of the act are mutual debts *before*; and as it was an unjuft attempt in *Scott*, to get 20*s.* in the pound. But the Chief Juftice confidering it might be dangerous to inquire into the precife time of indorfing negotiable notes, directed the jury to allow it; which with much difficulty, and merely in deference to his opinion, they did. But upon motion for a new trial the verdict was fet afide, with the concurrence of the Chief Juftice, the words of the act being as before ftated, and the defendant having no right to ftand in a better condition than *Scott*, who could only come in for a dividend: befides, it would be of ill confequence in trade, if debtors to the bankrupt's eftate fhould be allowed to buy up debts, in order to fet them off in this manner. They gave no opinion how it would be, if the nature of the tranfaction and the time of the actual indorfement did not appear.

[1235]

1 Wilf. Rep. 782.

Dominus Rex *verf.* Sir Henry Penrice.

Return is good if it purfues the fuggeftion of the writ.

MANDAMUS, fuggefting that *Matthew Hubbard* was in *Eafter* week chofen churchwarden of *Hefton*, and commanding the defendant to fwear him in, or fhew caufe to the contrary. To this he returned, that *Hubbard* was not elected in *Eafter* week, and that upon his offering to fwear him in, *Hubbard* refufed to accept the office.

To this I excepted, for that the return had confined it to a particular time, and was in the nature of a negative pregnant, for he might be chofen at fome other time; and returns (which are not traverfable) muft be certain to every intent. *Salk.* 432. And *Hubbard*'s refufal could be no reafon, for he might change his mind, and the parifh had an intereft in making him ferve the office. And the court held the latter part of the return infignificant; but as to the firft exception, they held it good, as it purfued the fuggeftion of the writ (1), and therefore allowed the return.

(1) *Rex* v. *Hill*, 1 *Show.* 253. S. P.

Sparrow *verf.* Caruthers.

[1236]

Goods loft after the owner has taken them from the fhip into a lighter is no charge on the infurer. Park on Mar. Infur. 23.

THE defendant infured goods to *London*, *and until the fame fhould be fafely landed there.* The fhip arrived in the port of *London*, and the owner of the goods fent his lighter, and received the goods out of the fhip: but before they reached land, an accident happened whereby the goods were damaged; for which this action was brought againft the infurer. For the defendant it was infifted upon, that the accident happening after the owner had taken the goods into his poffeffion, it was a lofs after the infurance was ended. To which I anfwered, that if this had been an action againft the mafter or owners of the fhip, that would have been a good anfwer; for they were certainly difcharged; but in this action it could be no anfwer, for during all the voyage it might as well be faid the goods were in the poffeffion of the affured, who took the fhip to freight, and whofe fervant the mafter was to this purpofe, as much as the lighterman: and thefe words are put into policies, to guard againft all forts of loffes, till there is an actual landing; becaufe in the cafe of fhips of great burthen, that are forced to lie off, there may be a carriage for many miles in boats or lighters, and it was in the courfe of trade for the owner of the goods to fend his lighter. But the Chief Juftice held, the infurer was difcharged. He faid it would have been otherwife, had the goods been fent by the fhip's boat, which is confidered as part of the fhip and voyage. And the jury (which was of merchants) expreffing, they thought it turned upon that diftinction, brought in a verdict as to this point againft the plaintiff.

Ante 690.

Michaelmas Term

19 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Martin Wright, *Knt.*
Sir Thomas Denison, *Knt.* } *Justices.*
Sir Michael Foster, *Knt.*

Sir Dudley Ryder, *Knt. Attorney General.*
The Hon. William Murray, *Solicitor General.*

Finch et ux' *vers.* Duddin et ux'.

IN an action for a battery of the plaintiff's wife by the defendant's wife, there was judgment for the plaintiffs, and the wife of the defendant was only taken in execution. She moved to be discharged, but upon affidavits of endeavors to take the husband, and it not appearing there was any design to screen him, the court refused it, on the authority of *Pitt* v. *Meller et ux'*, *ante* 1167.

Baron and Feme. Mich. 20 G. 2. Langstaffe v. Raine et ux', the same point ruled again.

Henbury *vers.* Rose.

ON the back of the issue was wrote, *Take notice of trial at the next assizes.* And though there was no date, or county, or attorney's name mentioned; yet being on the back of the issue, the court held it good; but that it would not be so on a separate paper.

Practice.

Mattison qui tam *verf.* Allanfon.

New trial where not grantable.

AN action was brought upon the late ftatute againft horfe-racing for the penalty; and the jury found a verdict for the defendant, contrary to plain evidence; and the court denied a new trial, there being no proof of any mifbehaviour in the defendant, or tampering with the jury (1). And this was within the reafon of cafes in the Exchequer where verdicts for defendants are never fet afide for penalties in the cafe of duties; and this is excepted out of the ftatute of jeofails, as much as indictments (2).

Ld. Raym 63. 2 Keb. 226.

(1) *Seymour Bart qui tam* v. *Day*, *ante* 89.

(2) How far actions and informations grounded on penal ftatutes are amendable. *Vide* 1 *Com. Dig. Amendment* (262.) 485.

Cary *verf.* Holt.

In trefpafs the plaintiff need only falfify the defendant's title.

THE plaintiff declared in trefpafs upon his poffeffion; the defendant makes title, and gives colour to the plaintiff; the plaintiff replies, *de injuria fua propria*, and traverfes the title fet out by the defendant; and upon demurrer, and on the authority of *Goflin* v. *Williams*, *P.* 5 *Geo.* 1. (*a*) the court held this a good replication; for it lays the defendant's title out of the cafe, and then it ftands upon the plaintiff's poffeffion, which is enough againft a wrong doer; and the plaintiff need not reply a title. Judgment *pro quer'.* (1).

(*a*) Rep. Fort. 378.

(1) *Vide Vernon* v. *Goodrick*, *ante* 5. *Bull. L. N. P.* 93.

The Mayor, &c. of Northampton *verf.* Thomas Ward.

Erecting a ftall in a market is not of common right, and trefpafs is the proper remedy for fo doing (1).

THE plaintiffs declare for a trefpafs committed by the defendant in breaking and entering their clofe called the *Butcher Row*, and erecting a ftall there. The defendant pleaded feveral pleas, which went to iffue, and were found againft him.

1 Wilf. 107. S. C. with the laft argument at the bar.

(1) So trefpafs lies for placing tables, ftools, &c. in a market place for fale without leave of the owner of the foil. *The Mayor of Norwich* v. *Swan*, 2 *Black.* 1116.

But

But his third plea was, that there is a publick market held every *Saturday* in the *locus in quo* for selling of butchers meat; wherefore he entered the market with his meat, in order to sell it, and for that purpose erected a stall in the open market, for the necessary exposing his meat to sale, and laid his meat upon the stall, *prout ei bene licuit*, *quæ est eadem*, *&c.* The plaintiffs replied, that they were seised in fee of the close and market, and that the defendant without their licence, and of his own wrong, entered and set up the stall. To this there was a frivolous rejoinder, and a demurrer.

It was three times argued at the bar, and insisted on for the defendant, that he had not only a right to come into the market, but also to erect a stall there; and that if he had not, yet trespass was not the proper remedy. [1239]

And now *Lee* C. J. delivered the resolution of the court.

As to the first point, they were all of opinion, that though every person has of common right a liberty of coming into a publick market for the purpose of buying and selling; yet he has not of common right a liberty of placing a stall there, but he must acquire that by a compensation, which is called stallage; and in *Blunt's Law Dictionary*, *Minsheu's*, *Boyer verbo Estallage*, and *Spelman's Glossary*, is defined to be a satisfaction to the owner of the soil, for the liberty of placing a stall upon it: and if in the erecting one the soil is broke, it is called *piccage*. And this of stallage is so fixed to the owner of the soil, that in *Mo.* 474. it is held to descend to the *Borough English* heir, though the right to hold the market goes to the eldest son. It is not properly a toll, which can only be due by grant or prescription; whereas stallage is demandable in the case of a new erected market; and the soil is no farther considered as dedicated to the publick, than the common right of entry goes. 2 *Inst.* 220. 1 *Ld. Raym.* 149.

As to the second point, they were all of opinion, that an action of trespass was the proper remedy for the owner of the soil, against one who wrongfully places a stall there: and he could have no other remedy; he could not distrain *damage feasant* (2), or if he could, it would not follow that trespass does not lie. He cannot bring debt or *assumpsit*, for there is no certain duty, or implied contract. *Spelman* says, the *stallagiator* must *facere redemptionem cum præposito burgi, secundum quod cum eo convenire poterit.*

(2) *Wigley* v. *Peachy*, 2 *Ld. Raym.* 1589. acc.

In all cafes of exceeding the authority given by law, the party is a trefpaffer. 6 *Carpenter's* cafe, 8 *Co.* 2 *Roll. Abr.* 561. *G.* 1. And this is not fo properly a non-feafance, as a mis-feafance. Though a man has a right to go into a church, yet he has no right to erect a pew there, without the direction of the ordinary.

They held therefore, that the plaintiffs had a right to a fatisfaction as owners of the foil, and that they had purfued the proper remedy: wherefore judgment was given for the plaintiffs.

[1240] Between the Parifhes of Crofcombe *and* St. Cuthbert in Wells.

Servant removing with his mafter in the fecond year gains a fettlement although there was no new hiring. Burr. Sett. Ca. 356. S. C. much fuller.

A Servant was hired for and ferved a year in *Crofcombe.* He continued to ferve on there without any new agreement for a quarter of a year, when the mafter removed into a houfe in *St. Cuthbert's*, where the fervant continued with him for half a year, and then married. The queftion was, whether this was a fettlement in *St. Cuthbert's* within the reafon of thofe cafes that have held the fettlement to be gained where the laft forty days fervice was? And the court held it a fettlement there, for it is ftill a continuing in the fame fervice within the meaning of 8 & 9 *W.* 3. *c.* 30. though there is no new agreement. And upon the whole there has been between this mafter and fervant a hiring and fervice for above a year. *Ante* 1164.

Dominus Rex *verf.* Baker.

Conviction good where only faid that the evidence was read to the party (1).

IN a conviction for keeping a lottery-office contrary to the late ftatute, it was ftated that *Jones* gave information before two juftices, and *Martindale* a credible witnefs proved the fact, whereupon due fummons iffued, and the defendant appeared; and the information aforefaid, and the faid evidence thereupon given, being now here *read unto and fully underftood by the faid* Francis Baker, he is afked what he has to fay.

I objected, that it fhould appear, the evidence was given *in the hearing* of the defendant; whereas it was only *read*, whereby the defendant lofes the benefit of a crofs examination: but the court held it well enough, for all is a hiftory in the prefent

(1) *Rex* v. *Vipont*, 2 *Burr.* 1163. feems *contra.* See alfo *Rex* v. *Crowther*, 1 *Term Rep.* 125. and the obfervations upon this cafe, *Bofcawen on Convictions* 71. 76.

tenfe,

tenfe, and fuppofed to pafs at the fame time : and if it had been *heard*, it might be faid to be only *hearing it read*. In thefe cafes it is enough, that it does not appear to be wrong ; and it is laid to be fully underftood by him. In the cafe of *Theed* on the candle act, it was held not to be neceffary to aver the entry of the officer to be in the day-time, and not in the night, when a conftable's prefence would be neceffary. The conviction was confirmed.

Ante 608.

The Weavers Company, qui tam, *verf.* Forreft, and Four Others, in feparate Actions, ante 1232. [1241]

Defendant who has *oyer* is not bound to infert it in his plea. *N. B.* It was held in *C. B.* (where other like actions were brought) that the words of 7 Geo. 2. being *any perfon or perfons*, a corporation could not fue as a common informer.

THE company brought actions as common informers for the penalties in the ftatute 7 *Geo.* 2. *c.* 7. for felling printed *callico*, and fet out their charter, to fhew they had power to fue and be fued, with a *profert*. The defendants demanded *oyer*, and had a copy of the charter delivered to them ; after which they put in the general iffue of *Nil debet* taking no notice of the *oyer*. The plaintiffs made up the iffue, and inferted the prayer and *oyer* at the head of the pleas, and demanded to be paid for it ; upon which the court was moved to expunge it, for though the defendants had a right to fee whether the plaintiffs *may* fue, yet they are not bound to infert the *oyer*, but may plead to the merits.

On the other fide it was infifted, that the demand and giving *oyer* is the act of the court, whofe acts either party has a right to record. And *Carthew* 301. *Ld. Raym.* 969, 1055. 1 *Saund.* 306. *Lutw.* 680. 1 *Vent.* 37. 2 *Mod.* 189. *Cro. Jac.* 679. *Co. Litt.* 260. *a.* were cited.

But the court held, that if the plaintiffs would avail themfelves of the letters patent being fet out at large, they ought to do it by praying them to be inrolled at the head of their replication, and ought not to do it at the defendant's expence, and therefore ordered the *oyer* to be expunged (1).

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(1) *Vide The Weavers Company* v. *Ware*, *C. B. Mich.* 8 *Geo.* *Barnes* 317, is contra, and fee *Wallace* v. *Dutchefs of Cumberland*, 4 *Term Rep.* 370 that if defendant after craving *oyer* of a deed do not fet forth the whole of it, the plaintiff may fign judgment as for want of a plea, or the court will quafh it. *Slater* v. *Home*, *E.* 34 *Geo.* 3. S.P. 2 *Tidd's Prac. K. B.* 309.

Jones *verf.* Edwards.

Conftruction of the act for making landlords defendants in ejectment. S. C. cited 2 Burr. 757.

BY the ftatute 11 *Geo.* 2. *c.* 19. it is provided, that the landlord may make himfelf a defendant in ejectment, tho' the tenant refufes to appear; and though judgment is figned againft the cafual ejector, the court fhall order a ftay of execution, *until they make further order therein.*

In this cafe the landlord appeared without the tenant; and after a verdict for the plaintiff, he brought a writ of error, upon which the plaintiff moved to take out execution; which the court refufed to grant, for though it is left to their difcretion, yet that can only be a legal one. The act intended to put the landlord in the place of the tenant, that he fhould not be ftripped by any act of the tenant, and it ought to be confidered as if the tenant had brought error, which would undoubtedly be a
[1242] *fuperfedeas.* This court cannot take upon them to judge, whether there is error in the proceedings or not (1).

(1) *Farfide on the demife of Lord Sydney Beauclerk v. Hayley, S. P.* in *C. B. Barnes* 208. and fee *George ex dem. Bradly* v. *Wifdom*, that the landlord muft affign this reafon on the day for fhewing caufe againft the rule for leave to take out judgment againft the cafual ejector, or the court will not permit him to open the matter again, 2 *Burr.* 757.

Forbes *verf.* Lord Middleton.

Defendant muft fearch for a *concilium*. The plaintiff is not obliged to ferve the rule when defendant demurs (1). Court will not fet afide regular judgment upon payment of cofts, to give the defendant the advantage of a nicety in pleading.

IN *affumpfit* the defendant pleaded the general iffue, and alfo the ftatute of limitations: the iffue was found againft him at the affizes; but as to the fpecial plea there was a replication, rejoinder, and fur-rejoinder, to which the defendant demurred, and the plaintiff joined in demurrer. This term the plaintiff made it a *concilium*, put it in the paper, and no body appearing to fupport the demurrer, obtained judgment. It was now moved to fet this afide as irregular, the rule for the *concilium* having never been ferved, or any notice given of putting it in the paper. But the court held it not to be irregular, and that it was the duty of the defendant to fearch, fince he muft expect the plaintiff would proceed. Then it was moved to fet it afide upon payment of cofts, upon the foot of fetting afide regular judgments

(1) *Vide Bland* v. *Dailey*, 3 *Term Rep.* 350.

ments (2). But the court said, that was never to be done, but where the defendant was to plead to the merits; not to give him the advantage of a nicety in pleading. And if there was any ground for the demurrer, (as in fact there was) he might bring a writ of error, but they would not relieve him, though he offered to waive a writ of error.

(2) *Fox* v. *Glass*, *ante* 823.

Dominus Rex *vers.* Magrath.

HE was committed for manslaughter. And it appearing to be no more, upon the depositions before the coroner, the court admitted him to bail, according to *Salk.* 104. *Trin.* 5 *Geo.* 2. *Rex* v. *Dalton*, and Mr. *Clifton*'s case.

The court will bail on depositions before the coroner.

Ante 911.

Wilson *vers.* Rogers et al'.

THE plaintiff was sued in the court of conscience in *London*, and was taken in execution, for which he brought trespass and false imprisonment; and now moved for liberty to inspect the book of the proceedings; which upon debate was granted, so far as related to the suit against himself only. Upon this ground, that every man has a right to look into the proceedings to which he is a party (1).

Access granted to books of court of conscience.

Ante 1223. and the note.

(1) *Vide Edwards* v. *Vesey*, *cas. temp. Hard.* 128. *Brewers Company* v. *Benson*, *Barnes* 231. *Sed vide Doctor Groenvoelt* v. *Doctor Burrell*, &c. 1 *Ld. Raym.* 252. *Carth.* 421. *Aberry* v. *Dickenson*, *Say. Rep.* 250.

De Balf *vers.* Mackensie. [1243]

THE plaintiff recovered in the court of *Meudon* in *France* damages and costs for a malicious prosecution to 2,500 *l.* he arrested the defendant here, and held him to bail, on an affidavi[illegible] of so much being due to him *upon a judgment or decree.* And [illegible] court held, this did not warrant holding to bail; for upon [illegible] cree here there can be no bail, and whatever might be th[illegible] a money debt contracted and sued for abroad; yet this [illegible] case of damages for a malicious prosecution, can never

There shall be common bail on a recovery in a foreign court.

Barnes 73. which seems S. C.

never be construed to raise a debt here. So common bail was ordered (1).

(1) According to the report in *Barnes*, this point was not stirred, the judgment being void; for the sentence of *Meudon* was annulled by an appeal to a superior court; the practice of which was to annul the sentence of the inferior court, and proceed as in an original suit.

Massa *vers.* Dauling. At Guildhall.

Usury (1).

UPON usury pleaded to an action against the defendant as indorser of a note for 200 *l.* The case was, that *Grace* took the note upon advancing 197 *l.* when the note had three months to run, and at the three months end took another note for 200 *l.* upon advancing 3 *l.* for other three months. It was insisted, that this was not usury, being a purchase out and out of the notes: and both parties becoming bankrupt, and the commissioners refusing to let these notes be proved, a petition was preferred to the Lord Chancellor, who directed an issue upon them. And now *Lee* Chief Justice held, that this was usury within the meaning of the statute 12 *Ann.* c. 16. which prohibits taking more than 5 *l.* *per cent.* upon any contract directly or indirectly: however he left it to the jury upon the question, whether this was to be deemed a purchase or a loan; who found it to be the latter, and the defendant had a verdict.

(1) *Vide Richards* v. *Brown*, *Cowp.* 770. *Lowe* v. *Waller*, *Dougl.* 736. See further upon this subject, 1 *Hawk. P. C. ch.* 82. and the cases collected in the 7th *edit.* 2 *vol.* 373. 6 *Com. Dig.* *Usury.* (A) 479, *et seq.*

Waples *vers.* Eames. At Guildhall.

Insurer is liable where ship goes back to perform quarantine. Vide Park on Mar. Insur. 35.

THE ship *Success* was insured at and from *Leghorn* to the port of *London*, and till there moored twenty-four hours in good safety. She arrived 8th *July* at *Fresh-wharf*, and moored, but was the same day served with an order to go back to the *Hope* to perform a fourteen days quarantine. The men upon this deserted her, and on the 12th the captain applied to be excused going back, which petition was adjourned to the 28th, when the regency ordered her back; and on the 30th she

went back, performed the quarantine, and then ſent up for orders to air the goods. But before ſhe returned the ſhip was burnt on 23d *Auguſt*. And now the queſtion was, whether the inſurer was liable?

For the defendant it was inſiſted, that the ſhip arriving and being moored on 8th *July*, and remaining ſo till the 30th, here was a performance of what he had undertaken, and his riſque ought not to be extended to ſo long a time as between 8th *July* and the burning 23d *Auguſt*.

But it was ruled, that though the ſhip was ſo long at her moorings, yet ſhe could not be ſaid to be there *in good ſafety*, which muſt mean the opportunity of unloading and diſcharging, whereas here ſhe was arreſted within the twenty-four hours, and the hands having deſerted, and the regency taken time to conſider the petition, there was no default in the maſter or owners. And it was proved that till the fourteen days were expired, there could be no application to air the goods. Wherefore the jury found for the plaintiff.

Hilary Term

19 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Martin Wright, *Knt.*
Sir Thomas Denison, *Knt.* } *Justices.*
Sir Michael Foster, *Knt.*

Sir Dudley Ryder, *Knt. Attorney General.*

The Hon. William Murray, *Solicitor General.*

Watkins *vers.* Hanbury.

One in execution may confess a new judgment without the presence of an attorney (1).

THE defendant being taken upon a *capias ad satisfaciendum*, paid part of the debt, and gave a warrant of attorney to confess a new judgment for the rest, upon time given him to pay it. This was moved to be set aside, because no attorney was present on the part of the defendant when the warrant was executed, according to two standing rules of the court of *Car.* 2. and 4 *Geo.* 2. the first of which indeed speaking of persons in custody on arrests, may extend only to *mesne* process; but the second is general, and relates to any sort of custody. But the court held the warrant of attorney to be well given, for the defendant had a benefit by it in gaining time, and the second rule must be construed *being in custody as aforesaid*, the only intent of

5 Mod. 144. that being, to make it necessary to have an attorney *on the part*

(1) *Vide* the rule *ante* 902. v. *Sharland*, 1 *Term Rep.* 715. *Fell* v. *Riley*, *Cowp.* 281. *Birch* S. P.

of

of the defendant, whereas under the former rule, an attorney for the plaintiff (who was not likely to advise the defendant for the best) was sufficient. 5 Mod. 144.

Vaughan *verf.* Fuller. In Middlesex. [1246]

If indorser pays part of a note, demand on the drawer is unnecessary.

IN an action upon a promissory note by the indorsee against an indorser, it was proved that the defendant had paid part of the money. And Chief Justice *Lee* held that sufficient, to dispense with the proving a demand upon the maker of the note.

Hubbard *verf.* Sir Henry Penrice.

Of common right the electing church-wardens is in the parson and parishioners.

TO a *mandamus* to swear the plaintiff churchwarden of *Heston* in *Middlesex*; the defendant returned, that he was not duly elected. And in the course of the trial the question was, where the common right of chusing churchwardens rests? The plaintiff insisted, it was in the parishioners at large as to both, and would therefore have left it upon the defendant to shew a custom, or right in the parson, to name one; and cited *Carth.* 118. *Noy.* 139. for that purpose. The defendant on the contrary insisted, that of common right it was in the parson and parishioners (1), and therefore it lay upon the plaintiff to prove a custom in the parishioners to chuse both; and cited *Cro. Jac.* 532. *Cro. Car.* 551. *Noy.* 31. 1 *Vent.* 267. And of this opinion was the Chief Justice, and that though there are some *dictums* to the contrary, yet they had never been regarded. The plaintiff therefore went on to prove a custom to chuse both by the parishioners, but failed in it; it appearing, that though the parson had generally left it to the parishioners, yet he had sometimes interfered.

A curate may nominate a church-warden.

The Chief Justice likewise held, that a curate stood in the place of the parson for the purpose of nominating one church-warden; and cited 2 *Vent.* 41. that a curate may make a presentment.

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(1) *Stutter* v. *Freston*, *ante* 52. S. P. acc. *Vide* 3 *Com. Dig. Esglise*, (F. 1.) 653.

Dominus Rex *verf.* Margaret Cooper.

None but a barretor or fcold can be indicted by general words.

SHE was convicted on an indictment for being *a common and turbulent brawler, and fower of difcord amongft her quiet and honeft neighbours, fo that fhe hath ftirred, moved, and incited, divers ftrifes, controverfies, quarrels and difputes, amongft His Majefty's liege people, contra pacem, &c.* (1)

[1247] It was moved in arreft of judgment, that the charge was too general, and did not amount to being either a barretor or common fcold, which are the only inftances in which a general charge will be fufficient. 1 *Sid.* 280. 6 *Mod.* 311. and 2 *Roll. Abr.* 79. 2 *Mod. Cafes* 52. *Hawk.* 198. 226. and *Rex* v. *Taylor, Mich.* 3 *Geo.* 2. *ante* 849. were cited for that purpofe.

Indictment againft a fcold fhould be laid *ad commune nocumentum.*

It was likewife objected, that if the words did amount to a defcription of a fcold, yet it fhould be laid to be *ad commune nocumentum* of her neighbours, for every degree of fcolding is not indictable.

And the court was of opinion (*abfente* C. J.) that the judgment ought to be arrefted on both exceptions, for none of the words here ufed are the technical words, and it muft be laid to be to the common nufance.

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(1) *Rex* v. *Taylor, ante* 849. 2 *Hawk. P. C. ch.* 25. *fect.* 59. 322.

Fitzgerald *verf.* Plunket.

No judgment can be entred but on a warrant agreeable to the rules, though executed abroad.

THE court fet afide a judgment entered up on a warrant of attorney given in *Ireland* by the defendant whilft in cuftody on *mefne* procefs at the fuit of the plaintiff, becaufe no attorney was prefent at the giving it, according to the rule of 4 *Geo.* 2. and faid that was an univerfal rule, and this plaintiff, if he would make ufe of this court, muft conform to its rules; comparing it to the cafe of ftamping foreign deeds before they can be read here (1).

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(1) *Vide ante* 902.

William King *verf.* The Inhabitants of the Hundred of Bifhop's Sutton in Hants.

BY 9. *Geo.* 1. *c.* 22. the hundred is made liable for damages fuftained by the wilful burning of barns, and it requires the party injured to give notice within two days, and within four days after *to give in an examination upon oath, whether he knows the perfon or perfons that committed fuch fact, or any of them:* and if he confeffes he knows them, then he is to be bound by recognizance to profecute.

"That he had "good reafons "to fufpect the fact was "done by *A.* "and *B.*" is an infufficient affidavit in an action againft the hundred under 9 Geo. c. 22.

In an action upon this ftatute, the oath proved was, *that he had good reafons to fufpect* the fact was done by *Robert Gibbs* and *William Langford*, both of fuch a parifh. And a doubt arifing at the affifes, whether this was fufficient or not, a cafe was made and twice argued at the bar.

And upon the fecond argument the court were of opinion, that the examination did not maintain the action. The oath required is a condition precedent, and for the fake of the hundred, and to prevent fcreening the offenders. There is a great deal of difference between *fufpecting* and *knowing:* a man who *knows* the offender may purpofely ftop at the word *fufpect,* to avoid being bound to profecute: and though it would be equivocating, yet it would hardly be a perjury affignable; it being only a fuppreffion of part of the truth. He fhould have faid, *I fufpect them to be the men, but I do not know it.* It will be dangerous to let them go out of the words of the act; and therefore the defendants muft have the *poftea,* and the plaintiff pay the cofts of a nonfuit. [1248]

Fletcher *verf.* Sandys. At Guildhall.

A Banker's note for 500 *l.* was paid to the plaintiff after dinner, who fent it the next morning at nine, when the banker had ftopped payment: and it was ruled, that there was no laches in the plaintiff, fo as to fix the lofs on him; and that in all thefe cafes there muft be a reafonable time allowed, confiftent with the nature of circulating paper credit.

Within what time a banker's note muft be demanded. Ante 1175. and the note.

Dick *verſ.* Barrell. At Guildhall.

Policy. Vide 19 Geo. 2. c. 37. Park on Mar. Inſur. 290.

THE plaintiff inſured intereſt or no intereſt on any ſhip he ſhould come in from *Virginia* to *London*, beginning the adventure on his imbarking on board ſuch ſhip; the money to be paid, though his perſon ſhould eſcape, or the ſhip be re-taken.

He embarked on the *Speedwell*, but ſhe ſpringing a leak at ſea, he went on board the *Friendſhip*, and arrived ſafe at *London*; but the *Speedwell* was taken after he left her. And now in an action againſt the under-writer he was held liable, for the inſurance is on the ſhip the plaintiff ſet out in; and had that got ſafe home, and the other been loſt, the plaintiff could not have recovered upon the foot of having removed his perſon into that ſhip in the middle of the voyage.

[1249]

Barjeau *verſ.* Walmſley.

A parol loan of money to play with is not void.

1 Phil 149

THE plaintiff and defendant gamed together at toſſing up for five guineas a time. And the plaintiff having won all the defendant's ready money, lent him ten guineas at a time, and won it, till the defendant had borrowed one hundred and twenty guineas.

In an action for money lent, it was inſiſted for the defendant, that by the ſtatute 9 *Ann. c.* 16. the plaintiff could maintain no action: for by that act "all notes, bills, bonds, judgments, "mortgages, or other ſecurities, or conveyances, given, granted, "drawn, entered into, or executed, for money knowingly lent "and advanced to game with, are made void." And the borrowing on an agreement to pay, *is a ſecurity.*

But the Chief Juſtice held this was not a caſe within the act, for there is not the word *contract*, as in the ſtatute of uſury: and the word *ſecurities*, as it ſtands in this act, muſt mean laſting liens upon the eſtate. The Parliament might think there would be no great harm in a parol contract, where the credit was not like to run very high; and therefore confined the act to written ſecurities. Wherefore the plaintiff obtained a verdict for 126 *l.* (1)

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(1) *Robinſon* v. *Bland*, 2 *Burr.* 1077. 1 *Black.Rep.* 231. *Bull. N. P.* 274. S. C. S. P.

Foster *verf.* Wilmer.

THE infurance was from *Carolina* to *Lifbon* and at and from thence to *Briftol:* it appeared, the captain had taken in falt, which he was to deliver at *Falmouth*, before he went to *Briftol*; but the fhip was taken in the direct road to both, and before fhe came to the point where fhe would turn off to *Falmouth*. And it was held, the infurer was liable; for it is but an intention to deviate, and that was held not fufficient to difcharge the under-writer. In the cafe of *Carter* v. *The Royal Exchange Affurance Company*, where the infurance was from *Honduras* to *London*, and a confignment to *Amfterdam:* a lofs happened before fhe came to the dividing point between the two voyages, which the infurer was held to pay for (1).

An intention to deviate does not difcharge the under-writers.

(1) This is recognized as law in *Thelufon* v. *Fergufon*, *Doug*. 346. *Wooldridge* v. *Boydell*, *Doug*. 16. But the court have in thefe cafes taken the nice diftinction, "that if the fhip infured for one voyage fails with the intention of performing one totally different, though fhe be taken before the dividing point of the two voyages, the policy is difcharged, becaufe there was in truth no inception of the voyage which the under-writer meant to infure. See alfo *Way* v. *Modigliani*, 2 *Term Rep*. 30.

Dean *verf.* Dicker. [1250]

THIS was an infurance on goods by the *Durfley* galley, intereft or no intereft, at and from *Jamaica* to *Briftol*. In her paffage fhe was taken by a *Spanifh* privateer, and carried into

On a policy intereft or no intereft a recapture after being in an enemy's port will not avail the infurer (1). Hewitt v. Flexney. *Like cafe upon a ranfom.*

(1) See the feveral cafes upon this fubject collected in Mr. *Parke's Treatife on Marine Infurance*, *p*. 73 *to* 78. But the 19 *Geo*. 2. *c*. 37. enacts, that infurances made on fhips or goods, intereft or no intereft, or without further proof of intereft than the policy, or by way of gaming or wagering, or without benefit of falvage to the infurer, fhall be null and void. Sect. 2. contains an exception in favour of private fhips of war fitted out folely to cruize againft the King's enemies, and fect. 3. merchandizes, &c. from any port or place in *Europe* or *America*, in the poffeffion of *Spain* or *Portugal*. But this act does not extend to infurances of foreign property and on foreign fhips. *Thellufon* v. *Fletcher*, *Doug*. 315.

Mores, a port in *Spain*, kept eight days, and then cut out by an *English* ship. And the plaintiff insisting, that this, though on goods, was to be considered as a wager on the bottom of the ship, brought his action as upon a total loss. The defendant insisted, that by the statutes of 13 *Geo.* 2. *c.* 4. and 17 *Geo.* 2. *c.* 34. this ship is to be restored to the owners upon paying salvage, and consequently this is only an average loss; and the plaintiff can only recover upon a total one. But the Chief Justice held, that in this case the plaintiff ought to recover; for his is a wager upon a total loss in the voyage, and here has happened one; for the being carried into port and detained eight days makes one. And where the policy is interest or no interest, the provisions of the acts in the case of valued policies cannot take place. The act does not declare the property is not gone by such a capture, but only provides for restoring the ship to whom it *did* and shall be proved *to have belonged*. He said it might be otherwise, where the recapture was before the ship was carried *intra præsidia*, or in the case of goods actually on board, and upon a valued policy.

Victorin *verf.* Cleeve.

What is departing with convoy. Vide Park 348.

THE plaintiff insured on goods in the *John and Jane* from *Gottenburgh* to *London*, with a warranty to depart with convoy from *Fleckery*. In *July* 1744, the ship sailed from *Gottenburgh* to *Flackery*, and there she waited for convoy two months; on 21 *September* at nine in the morning three men of war who had one hundred merchant ships in convoy, stood off *Flackery*, and made a signal for the ships there to come out, and likewise sent in a yaul to order them out. There were fourteen ships waiting, and the *John and Jane* got out by twelve o'clock, and one of the first; the convoy having sailed gently on, and being two leagues a head. It was a hard gale, and by six in the afternoon the ship came up with the fleet, but could not get to either of the men of war for sailing orders, on account of the gale of wind. It was stormy all night, and at day break the ship in question was in the midst of the fleet, but the weather was so bad, that no boat could be sent for sailing orders. A [1251] *French* privateer had sailed amongst them all night, and the 22d it being foggy, attacked the *John and Jane* about two, who kept a running fight till dark, which was renewed the next morning, when she was taken.

For the defendant it was insisted, that this ship was never under convoy, nor is ever considered so till they have received sailing orders; and if the weather would not permit the captain to

o get them, he ſhould have gone back. But the Chief Juſtice and jury were both of opinion, that as the captain had done every thing in his power, it was a departing with convoy: and theſe agreements are never confined to the preciſe words; as in the caſe of departing with convoy from *London*, when the place of rendezvous is *Spithead*; a loſs in going thither is within the policy. So the plaintiff recovered.

Furſtenam v. Marsh, at Guildhall, post. term Mich. 20 Geo. 2. a like caſe.

Tonge *verſ.* Watts.

THE plaintiff inſured on ſhip and freight at and from *Jamaica* to *Briſtol*. A cargo was ready to be put on board; but the ſhip being careening, in order for the voyage, a ſudden tempeſt aroſe, and ſhe and many others were loſt. The rigging and parts of her were recovered and ſold; and the defendant paid into court as much as upon an average he was liable to for the loſs of the ſhip: but the plaintiff inſiſted to be allowed 600*l.* for the freight the ſhip would have earned in the voyage, if the accident had not happened. But as the goods were not actually on board, ſo as to make the plaintiff's right to freight commence; the Chief Juſtice held, he could not be allowed it, and he was called (1).

The freight a ſhip would earn is no part of the damages unleſs the goods are on board.

(1) But in the inſtance of a valued policy, where part of the cargo was on board when the ſhip was loſt, the reſt being ready for ſhipping, it was held that the inſured was intitled to recover the whole. *Montgomery* v. *Eggington*, 3 *Term Rep.* 362. *Vide Park.* 36.

Pariſh *verſ* Crawford.

THE defendant was ſole owner of a ſhip, which he let to one *Fletcher* for a voyage at a certain ſum, and *Fletcher* was to have the benefit of carrying goods. The plaintiff ſent a quantity of moidores, and had bills of lading ſigned by the captain; and many of the moidores not being delivered according to the conſignment, an action was brought againſt the defendant the owner of the ſhip, to make him liable as far as the ſhip and freight was worth, according to 7 *Geo.* 2. *c.* 15.

The owner and not the freighter is liable for a loſs of gold ſent by the ſhip.

For the defendant it was inſiſted, that though the ſhip was his property, yet he was not *ſo* owner as to be liable to the plaintiff:

plaintiff: and that *Fletcher* is for this purpose the owner. But it appearing the defendant had covenanted for the condition of the ship, and the behaviour of the master; the Chief Justice held, he was liable to the plaintiff, and the freight he had in general from *Fletcher* was sufficient, though the identical freight for the gold belonged to the other, and *Fletcher* had only the use of the ship, but no ownership (1).

(1) *Vide Boucher* v. *Lawson*, *Cas. temp. Hardw.* 85. 195. before the passing of 7 *Geo.* 2. c. 15. and see *Rich* v. *Coe* & *al'* *Cowp.* 636.

Eaſter Term

19 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Juſtice.*

Sir Martin Wright, *Knt.*
Sir Thomas Deniſon, *Knt.* } *Juſtices.*
Sir Michael Foſter, *Knt.*

Sir Dudley Ryder, *Knt. Attorney General.*

The Hon. William Murray, *Solicitor General.*

Holdfaſt, on the Demiſe of Anſtey, *verſ.* Dowſing.

EJECTMENT for lands in *Cambridgeſhire* on the demiſe of *Chriſtopher Anſtey* D. D. and *Mary* his wife. And upon a trial at bar the jury found this ſpecial verdict.

One of the ſubſcribers to the atteſtation of a will had an intereſt under it, and held not to be a credible witneſs within the ſtatute. 1 Black. 8. S. C. in Cam. Scacc.

That *James Thompſon*, Eſq. being ſeiſed in fee of the premiſſes in queſtion, and of ſound mind, ſigned, ſealed and publiſhed a paper writing, purporting to be his laſt will, dated 10 *February* 1742, and which is found *in hæc verba*: by this he declares, that he deviſes to the defendant the lands in queſtion for life, remainder to his firſt and every other ſon and ſons in tail male, remainder to his daughters as tenants in common, with a reverſion in fee to the right heirs of the deviſor: then he charges all his real and perſonal eſtate with particular annuities and legacies, and particularly an annuity of 20 *l. per annum* to *Elizabeth* the wife of *John Hailes* for her life and to her ſeparate uſe; and he alſo gives a legacy of 10 *l.* each to *John Hailes* and his wife for mourning. That to this will there are three perſons who ſubſcribe

fcribe their names as witneffes, whereof *John Hailes* is one: and that in their prefence, and of no body elfe, he figned, fealed, and publifhed the paper writing as and for his laft will; and they three attefted the fame in his prefence, and are all three living. They find the identity of *John Hailes* the legatee and fubfcriber, and that *Elizabeth* his wife is ftill living. That the devifor died 28 *May* 1743, without iffue, and feifed as aforefaid, and that Mrs. *Anftey* (one of the leffors) is his aunt and heir at law. They find that before and at the time of the trial the defendant made a tender to *John Hailes* of 20 *l.* for his and his wife's legacies, which he refufed to accept, and that thofe legacies are not difcharged. Then they find the entry and demife by the leffors, *&c. fed utrum, &c.*

This caufe was three times argued at the bar, and this term the Chief Juftice delivered the refolution of the court.

The queftion upon this fpecial verdict is, whether in the light *Hailes* now ftands, he is to be confidered as a credible witnefs within the intent of the ftatute of frauds? And we are all of opinion he is not.

The right to devife in this cafe is not a common law right, it being inconfiftent with the notion of a feudal tenure, *Wright's Tenures* 174. but it depends upon powers given by ftatutes, which muft all be confidered together, as creating one general parliamentary rule: the particulars of which are, that it muft be in writing, figned, and an atteftation of three credible witneffes in the prefence of the devifor. Thefe were checks introduced to prevent men from being impofed upon; and certainly meant, that the witneffes (who are required to be credible) fhould not be fuch as claim a benefit by the will. Though a will may be read, on proof of all the circumftances by one witnefs: yet that is upon a fuppofition, there are two others, who could be allowed to give the fame teftimony.

Carth. 35. Show. 18. 1 Mod. 262. Comb. 174.

If the tender would be equal to the payment of the two money legacies, (as it is not) (1) yet the annuity charged upon the eftate devifed would ftill fubfift; and though it is charged both upon real and perfonal eftate, and the perfonal (which is not found to be fufficient) would be the firft fund, yet it is for *Hailes*'s advantage to enlarge the fund by taking in the real eftate; and we muft at law confider the hufband as benefited by the annuity, though given to her feparate ufe; for it is his mo-

(1) *Vide Wyndham* v. *Chetwynd*, 1 *Burr.* 423. 424. *contra.*

ney

ney the moment it is paid into her hands, or if not, it eases him in point of maintenance.

It was objected, that nothing vests till the death of the devisor, and therefore at the time of the attestation he had no interest. But the answer is, that he was then under the temptation to commit a fraud, and that is what the Parliament intended to guard against. [1255]

Another way by which it was attempted to be supported is, that it may be void as to the annuity, but good as to the devise to the defendant; which is grounded upon an expression in *Carthew's* report of the case of *Hilliard* v. *Jennings* 514 (*a*). that the will was void *quoad the devise of lands to the plaintiff*. But whoever reads that will from the record will see, that there were no other lands devised, and therefore it is equal to saying it is void as to any passing of lands; and it was proper to confine the invalidity of it to lands, because as to personal estate it was certainly a good will.

(*a*) Com. Rep. 91. 1 Freem. 510. 1 Ld. Raym. 505. Ca. B. R. T. W. 3. 276. S. C.

Consider what a door this would open to fraud: a man has four estates, and is beset by four, who fraudulently procure a will, whereby each has a separate estate devised to him. If one is allowed to be a witness for the other three, they thereby establish it for the whole. In 1 *Ld. Raym.* 730. it is held, that there must be an ability as to the whole will, and not as to a particular legacy. In the case of a will consisting of several sheets of paper, as 3 *Mod.* 263. the party benefited in one sheet cannot be set up to prove every other sheet.

It was agreed, this man could not be examined; how then is he that credible witness that the statute requires?

The true time for his credibility is, the time of attestation; otherwise a subsequent infamy, which the testator knows nothing of, would avoid his will.

And as to what is said in *Swinb.* 296. it relates only to wills of personal estate, and cannot affect the construction of the statute.

The *Digest, lib.* 28. *tit.* 1. *l.* 22. *De testibus, subscriptione, et signis*, is express: *Conditionem testium tunc inspicere debemus, cum signarent, non mortis tempore*, and so is the *Code, lib.* 6. *tit.* 23. *l.* 1.

We therefore hold this not to be a good attestation of a will of lands; and then the title of Mrs. *Anstey* the lessor of the plaintiff

See 25 Geo. 2. c. 6.

plaintiff as heir at law is not defeated by what is set up as a will: and consequently the plaintiff must have judgment (1).

(1) Under what circumstances a subscribing witness shall be deemed a "*credible*" within the meaning of 25 *Geo.* 2. *c.* 6. see *Windham* v. *Chetwynd*, 1 *Burr.* 414. 1 *Black.* 95. *Bull. L. N. P.* 265. S. C. *Lord Ailesbury's case*, cited 1 *Burr.* 427. *Baugh* v. *Halloway*, 1 *P. Wms.* 557. *Price* v. *Lloyd*, 2 *Vez.* 374. *Doe dem. Kindson* v. *Kearsey*, 4 *Burn's Eccl. Law*, 86. where the authority of this case is considerably shaken.

[1256]

Between the Parishes of Osgathorpe *and* Diseworth.

What orders are final between two parishes. Burr Sett. Ca. 201. S. C.

A Person was removed by order of two justices of the peace from *Diseworth* to *Osgathorpe*, which order on appeal was discharged. He was by a second order sent from *Diseworth* to *Osgathorpe* as a certificate man; and upon an appeal it was stated, that the first removal was *before he became chargeable*, and the second *after* he became so; and the sessions were of opinion that the first determination was not final between the parishes, and therefore confirmed the second order of removal.

And it was moved to quash these two last orders, on the authority of *Salk.* 492, 524. which says, a reversal is final between the parties. *Sed per curiam*, So it would be, if the special matter did not appear; a certificated person cannot be sent back, until he is actually a charge; a removal before is premature. The consequence of which only is, that he must be suffered to remain till he does become chargeable, but not to make a premature removal final for ever. The last orders must be confirmed.

Dominus Rex *vers.* James et al'.

Sessions has no jurisdiction as to new offences without express words. Salk. 680. 4 Mod. 51. 4 Mod. 379. 5 Mod. 149. Cro. Eliz. 87. 5 Co. 118. b. Vid. 4 Com. Dig. (B. 1.) (B. 3.) tit. *Justice*.

INDICTMENT at *Cumberland* sessions for fastening nets across the river *Eden*, contrary to the statute 2 *Hen.* 6. *c.* 15. There were many exceptions taken to it, but the objection for which it was quashed, was, that the statute gives a penalty of 100 *s.* but gives no jurisdiction to the sessions, and they cannot have it without express words, in the case of a new-created offence.

Trinity Term

* 19 Georgii 2 Regis. In B. R.

* 19 & 20. See Burr. Settl. Ca. 264. pl. 10. 1 Wilf. 134.

Sir William Lee, *Knt. Chief Juſtice.*

Sir Martin Wright, *Knt.*
Sir Thomas Deniſon, *Knt.* } *Juſtices.*
Sir Michael Foſter, *Knt.*

Sir Dudley Ryder, *Knt. Attorney General.*

The Hon. William Murray, *Solicitor General.*

Lloyd *verſ.* Vaughan.

Reverſioner cannot have error after 20 years, though his title did not accrue till after.

UPON error to reverſe a common recovery ſuffered at the grand ſeſſions in *Wales*, 5 *Ann.* the error aſſigned was, that *Jane Lloyd*, the tenant in tail who was vouched as a *feme ſole*, was then under coverture, and died without iſſue in 1739. Wherefore the plaintiff, who was the reverſioner, brings the writ of error. The defendant in error pleads a bar by the ſtatute 10 *W.* 3. *c.* 14. as not being a writ of error brought within twenty years after ſuffering the recovery. To this it was replied, that his title did not accrue till 1739, the time of the death of *Jane*. And to this there was a demurrer, and joinder in demurrer.

After ſeveral arguments at bar, both upon the point of the error, and the ſtatute of limitations; it was this term determined upon the latter point, the court ſaying, they had no occaſion to go

go into the other queſtion, being of opinion the writ of error did not lie.

[1258] And what they grounded this opinion upon was, that the ſtatute was made to quiet poſſeſſions, and to fix one certain period, beyond which fines and recoveries ſhould not be impeached: the words are expreſs, *Twenty years after the recovery ſuffered*, and it has not the words that are in the ſtature of fines, *after the title accrued*. And though there is a proviſo for perſons under diſabilities within the twenty years, yet that can only introduce the diſabled perſon, and not one who never was under any diſability. The *terminus a quo* is the ſuffering the recovery, and if we exceed it, there will be no end; a reverſioner after an eſtate-tail that ſubſiſts an hundred years, might at this rate reverſe a recovery; whereas theſe reverſioners were never the object of the legiſlature's care. It is enough that he has a chance of the reverſion's falling within twenty years, and then he may have error. They ſaid they muſt keep to the words, as in 1 *Lev.* 31. where the courts not being open, was held no anſwer to the ſtatute of limitations, as not being one of the exceptions in it. Therefore they gave judgment that the plaintiff ſhould take nothing by his writ of error.

The courts not being open is no bar to the ſtatute of limitations.

Forteſcue Aland *verſ.* Maſon, *ante* 861.

Where on error from *Ireland* on a collateral point the judgment is affirmed, the record muſt be ſent back, and *B. R.* in *England* cannot proceed upon it. 1 Barn. B. R. 5. 100, 176, 231, 288 Fitzg. 114. 2 Ld. Raym. 1433. S. C.

THE defendant in error being come of age, the plaintiff in error took out a *ſcire facias ad audiendum errores in B. R.* in *England*. But it was ruled, that this court could not proceed: for though if they had reverſed the judgment for the parol to demur, they might then do as the court in *Ireland* ſhould have done, by going on to examine the errors; yet having affirmed their proceedings, the record muſt be remitted to the King's Bench in *Ireland*, for them to warn in the heir; elſe it would be judging *per ſaltum* of the errors, without the intervention of that court. So the record was removed by an award *nunc pro tunc*.

Moore *verſ.* Fernyhouth.

Venue not to be changed where cauſe of action ariſes in a *Welch* county. 1 Wilſ. 135. S.C. 1 Wilſ. 221. Ante 857. Poſt 1270.

THE *venue* was laid in *London*, and it was moved to change it into *Salop*, upon an affidavit that the cauſe of action aroſe in *Denbighſhire*, and *Salop* was the next adjacent *Engliſh* county. But the court ſaid it could not be done without conſent. And Mr. Juſtice *Deniſon* ſaid it was denied to him *Mich.* 8 *Geo.* 2. *Lloyd* v. *Williams*. *Ld. Raym.* 1418.

Dominus Rex *verſ.* The Churchwardens of Weobly.

THE court refuſed to grant a *mandamus*, directing to inſert particular perſons in the poor's rate, upon affidavits of their ſufficiency, and being left out to prevent their having votes for Parliament-men: for that the remedy was by appeal, and this court never went further, than to oblige the making a rate, without meddling with the queſtion, who is to be put in or left out; of which the pariſh officers are the proper judges ſubject to an appeal (1).

No mandamus to inſert particular perſons in poor's rate. 1 Bott by Conſt, 81. pl. 112, 224. pl. 230. S.C.

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(1) *Rex* v. *Overſeers of Barnſtaple, fol.* 26. *Rex* v. *Churchwardens of Freſhford, And.* 24. *Rex* v. *Guardians of the Poor of Canterbury*, 4 *Burr.* 2290. That a mandamus does not lie to make an equal rate.

Markham *verſ.* Middleton.

THE defendant owed the plaintiff 333 *l.* for an apothecary's bill, and ſuffered judgment to go by default; and the plaintiff's attorney, on executing the inquiry, produced the foreman, who had told him he could prove the bill; but when the jury was ſworn, he declined giving any evidence. Upon which the ſheriff was deſired to adjourn, which he thought he could not do, and the jury thereupon found one penny damages only.

Writ of inquiry ſet aſide for ſmallneſs of damages.

This was moved to be ſet aſide, upon the head of ſurprize and miſtake of the ſheriff; upon the authority of *Woodford* v. *Eades*, (*ante* 425.) *Parry* v. *Niblett*, (*Paſch.* 10 *Geo.* 1.) and *Coleman* v. *Mawby*, (*ante* 853.)

The court thought it hard the plaintiff ſhould be paid ſo large a debt with one penny, as he would be if this verdict ſtood; or that his caſe ſhould be worſe for the defendant's letting judgment go by default: for had he pleaded, the plaintiff could have ſuffered a nonſuit. And therefore they ſet aſide this, and ordered a new writ of inquiry, on payment of coſts (1).

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(1) *Vide* alſo *Hall* v. *Stone*, *ante* 515. *Chambers* v. *Robinſon*, *ante* 692. and the caſes there cited. *Hayward* v. *Newton*, *ante* 940. and the note.

Michaelmas Term

20 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Martin Wright, *Knt.*
Sir Thomas Denison, *Knt.* } *Justices.*
Sir Michael Foster, *Knt.*

Sir Dudley Ryder, *Knt. Attorney General.*

The Hon. William Murray, *Solicitor General.*

* Robinson *verf.* Stone.

An administrator or executor may indorse bills or notes, within the custom of merchants. 3 Wilf. 1. S. C. more at large 2 Burr. 1225. S. C. Barnes 164. S. C. in C. B.

ON error from *C. B.* it appeared to be an action by indorsee of a promissory note, indorsed by a woman as administratrix: a demurrer to the declaration, and judgment for the plaintiff.

It was objected, that an administratrix was not within the custom of merchants in the case of bills of exchange. And the statute 3 *Ann. c.* 9. makes notes assignable only in the same manner as bills of exchange are. *Sed per curiam,* We cannot

* *Rawlinson* seems the right name, see *Burrow, Wilson,* and *Barnes,* n. to 2d *edit.*

say

say this upon a demurrer. It should have been pleaded, or found, not to be within the custom: and it is every day's practice, to have indorsements made by executors.

It was then objected, that there was no *profert* of letters of administration. *Sed per curiam*, That is only required, where the action is *by* an administrator, but not where a third person only derives *through* one. The judgment was affirmed.

Profert, where necessary.

[1261]

Case of the Overseers of Weobly in Herefordshire.

THERE were two sets of overseers appointed, and both quashed; one because the persons appointed were described only as *principal inhabitants*, instead of pursuing the words of the statute 43 *Eliz. c.* 2. which are *substantial householders*: and the other because it only called them substantial householders, without adding *there*, or *in the parish*; and this too was not in the body of the appointment (as it ought to be) but only in the direction at the foot of it (1).

It is not enough that overseers are stiled principal inhabitants.

(1) *Rex* v. *Great Marlow*, *Foley* 5. *Rex* v. *Clerkenwell*, *Ib.* 4. and three authorities there cited. *Rex* v. *Sherringbrook*, 2 *Ld. Raym.* 1394. 2 *Sess. Ca.* 52. *pl.* 54. *Rex* v. *Murrel*, 1 *Sess. Ca.* 233. *pl.* 189. S. P. But *Rex* v. *Morris*, 4 *Term Rep.* 550. *Nol. Rep.* 31. seems *contra*.

Lowfield *vers.* Stoneham, Executrix. At Guildhall.

UPON *plene administravit* pleaded, the question was, whether 1000 *l.* received by the defendant was due to her in her own right, or as executrix of her husband, and consequently assets. And it arose upon the following devise, "I give to "my loving brother *John Stoneham* 1000 *l.* and in case of his "death, to his wife *Susanna*," (who was the defendant). It appeared that *John Stoneham* survived the testator; and therefore the plaintiff insisted, this legacy (which the defendant admitted to have received) vested absolutely in him, and was assets in her hands.

Parol evidence not admitted to contradict the words of a will.

3 Mo. W. K. 72

On the part of the defendant it was offered to give in evidence, that the testator *in extremis* declared, he meant only to give his brother the interest of the 1000 *l.* and that the defendant should have the principal in case she survived him.

This

This parol evidence was oppofed by the plaintiff's counfel, as being contradictory to the plain words of the will. And the Chief Juftice faid, it could not be allowed; and that in the cafe of *Selwin* v. *Brown* (*a*), the Houfe of Lords had refufed it, even where it was to fupport the legal interpretation of the will; and Lord *Hardwicke* about two years ago held it in the fame manner in the cafe of the Earl of *Inchiquin* v. *Obrian* (1).

(*a*) Forreft. 240. 4 Bro. P. C. 179.

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(1) *Vide Strode* v. *Lady Falkland*, 2 *Vern.* 621. *Bertie* v. *Falkland*, *Salk.* 231. but reverfed in *Dom. Proc. Ballis* and *Church* v. *Attorney General*, 2 *Atk.* 239. *Bull. L. N. P.* 298. *S. C. Cole* v. *Rawlinfon*, *Salk.* 234. *Chamberlayne* v. *Chamberlayne*, 2 *Freem.* 51. *Whittons* v. *Ruffell*, 1 *Atk.* 448. *Ulrick* v. *Litchfield*, 2 *Atk.* 373. *Caftledon* v. *Turner*, 3 *Atk.* 257. *Hampfhire* v. *Pierce*, 2 *Vef.* 217. *Maybank* v. *Brook*, 1 *Bro. Chan. Rep.* 84. See more 8 *Vin. Abr.* 189. But parol evidence has been admitted in favour of executors to rebut the equity of the next of kin to the undifpofed furplus of perfonal eftate, *Countefs of Gainfborough* v. *Earl of Gainfborough*, 2 *Vern.* 258. *Littlebury* v. *Buckley*, cited 2 *Vern.* 677. *Batchelor* v. *Searl*, *Ib.* 736. *Crompton* v. *North*, cited *Ib.* 253. *Wingfield* v. *Alkinfon*, *Ib.* 673. *Petit* v. *Smith*, 1 *P. Wms.* 9. *Lamplugh* v. *Lamplugh*, *Ib.* 112. *Lady Granville* v. *Dutchefs of Beaufort*, *Ib.* 115. 2 *Vern.* 648. *S. C. Duke of Rutland* v. *Dutchefs of Rutland*, 2 *P. Wms.* 109. *Heron* v. *Newton*, cited *Ib.* 160. 9 *Mod.* 11. *Wheeler* v. *Sheers*, *Mofl.* 292. *Brafsbridge* v. *Woodroffe*, 2 *Atk.* 68. *Hatton* v. *Hatton*, 2 *Eq. Ca. Abr.* 443. *pl.* 56. *Lake* v. *Lake*, 1 *Wilf.* 313. *Amb.* 126. S. C. But fee the opinion of Lord *Hardwicke* in *Blinkborne* v. *Feaft*, 2 *Vez.* 28. *Vide* alfo *Mallabar* v. *Mallabar*, *Ca. temp. Talb.* 78. *Gafcoigne* v. *Thwing*, 1 *Vern.* 366. *Walker* v. *Walker*, 2 *Atk.* 98. *Brady* v. *Cubitt*, *Doug.* 31. *Coote* v. *Boyd*, 2 *Bro. Chanc. Rep.* 521. *Clinton* v. *Hooper*, 3 *Bro. Chanc. Rep.* 201. It feems alfo to have been admitted to fupport the refulting truft for the next of kin, in *Fane* v. *Fane*. 1 *Vern.* 39. *Bifhop of Cloyne* v. *Young*, 2 *Vez.* 95. and *Rachfield* v. *Carelefs*, 2 *P. Wms.* 157. And that it is equally admiffable againft the executor as for him, *vide* 2 *Bro. Chanc. Ca.* 527. As to cafes in which parol evidence has been held admiffible or not, in explanation of other written inftruments. *vide Wilfon* v. *Poulter*, *ante* 794.

[1262]

Merryman *verf.* Carpenter.

Practice.

THE writ was returnable in *Eafter* term, and a bail-bond taken; the plaintiff never ftirred till 24th *October*, and then took an affignment of the bail-bond: and fpecial bail being put in the next day, the queftion was, whether on ftaying proceedings the bail-bond was to ftand as a fecurity. The defendant infifted, it fhould not, becaufe the plaintiff did not deliver a declaration *de bene effe*, as he might have done, and thereby quickened the defendant. But the court held, he was not bound

bound to do so; and the defendant was in the first fault, whereby the plaintiff had lost a trial. So the defendant was forced to consent, to let the bail-bond stand as a security (1). *Ante* 814.

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(1) *Vide Carmichael* v. *Chandler*, *T.* 24 *Geo.* 3. *Imp. Prac. K. B.* 150. *Ed.* 1791. *Tidd's Prac.* 155. *Ward* v. *Alderton*, *Prac. Reg.* 71. *Sparrow* v. *Nayler*, in *C. B. contra*, 2 *Black.* 876.

White *verſ.* Haugh.

Sheriff cannot refuse to obey process for non-payment of fees.

THE sheriff had the defendant in execution on a *capias ad satisfaciendum*; and the plaintiff delivered him a *habeas corpus*, in order to remove him into the *King's Bench* prison: the sheriff upon this insisted to be paid his poundage on the execution, before he parted with the body of the defendant; and would have distinguished this from the cases in *Salk.* 330, 331, 332. inasmuch as he had here actually executed the process, and those cases go only against his insisting to be paid beforehand. And that there is nothing in the statutes 29 *Eliz. c.* 4. or 3 *Geo.* 1. *c.* 15. § 17. against it: and offered on payment of his poundage, to bring up the body. But the court said, they could not be making bargains with people to obey their process, which they would force an obedience to, and leave the sheriff to his action of debt for the fees, which was his legal remedy. It went off at last, upon the sheriff's submitting to carry him to a Judge's chamber. And *Foster* Justice said, If he was brought to him, he would not turn him over, till the poundage was paid (1).

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(1) *Vide Anon. ante* 308. *Hopman* v. *Barber*, *ante* 814. *Tid. Prac. K. B.* 176.

Hilary Term

20 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt.* *Chief Justice.*

Sir Martin Wright, *Knt.*
Sir Thomas Denison, *Knt.* } *Justices.*
Sir Michael Foster, *Knt.*

Sir Dudley Ryder, *Knt.* *Attorney General.*
The Hon. William Murray, *Solicitor General.*

Dominus Rex *verf.* Sir Robert Cann.

Orders of fewers. Practice thereupon.

SOME orders of fewers having been made upon him, he removed them by *certiorari.* And upon the motion to file, the commiffioners offered to try any iffue the defendant could take upon them: he refufed to come into any iffue, and the court inclined to grant a *procedendo* for that reafon: but upon further confideration, they thought they could not refufe to hear the objections; but then they would not file the orders firft, but debate the objections upon the motion to file, fo as to have it in their power to fend them back again (1).

(1) *Anonymous,* 11 *W.* 3. *B. R.* *Salk.* 145. *Anon.* 5 *Geo.* 2. 2 *Barnard. B. R.* 151. 2 *Hawk.* *P. C.* 409. *c.* 27. *f.* 34. *S. P.* *Sed vide* a note of a cafe 4 *Ann. B. R.* at the end of the cafe in *Salkeld.*

Dominus Rex *verſ.* the Inhabitants of Polſtead.

APPEAL was made to the quarter-ſeſſions in *Suffolk*, held 7 *April* 1746, againſt an order of removal. The ſeſſions was adjourned to 9 *April* at *Woodbridge*, where for want of a ſufficient number of juſtices nothing could be done. The 11th of *April* a ſeſſions is held at *Ipſwich*, and adjourned to the 14th at *Bury*, where the appeal was allowed.

A quarter-ſeſſions once dropt cannot be reſumed.

[1264]

It was moved to quaſh the order of ſeſſions, as made without juriſdiction, the ſeſſions ending for want of an adjournment at *Woodbridge*. And of that opinion was the court, for the words in 2 *H.* 5. *c.* 4. *and more often if need be*, were never conſidered as giving more than one original ſeſſions in a quarter, but only impowering adjournments. The country muſt take notice of of adjournments, but are not ſuppoſed to expect a new ſeſſions till the uſual time. The order of ſeſſions was quaſhed (1).

(1) *Rex* v. *Weſt Torrington, Burn.* authorities collected 2 *Bott by S. C.* 293. *S. P. Vide* alſo the *Conſt,* 843, 4, 5.

Dayrell *verſ.* Bridge.

ON a motion for a new trial, the *poſtea* was brought into court; and after the new trial had been denied, the *poſtea* could not be found. And the court (on debate) ordered a new one to be made out from the record above and the aſſociates notes (1).

New *poſtea* made out.

Ante 1077. 141—833.

(1) *Stone* v. *Overton, Barnes* 14. *Darby* v. *Gold,* 2 *Kely.* 106. *Harvey* v. *James,* 1 *Vent.* 92. *Tufton* v. *Aſhley, Cro. Car.* 145. *Rex* v. *Keat, Salk.* 47. 1 *Ld. Raym.* 138. *S. C. Bold's Caſe, Salk.* 58. 1 *Ld. Raym.* 335. *S. C.*

Smith *verſ.* Pelah. At Guildhall.

THE Chief Juſtice ruled, that if a dog has once bit a man, and the owner having notice thereof keeps the dog, and lets him go about, or lie at his door; an action will lie againſt him at the ſuit of a perſon who is bit, though it happened by ſuch perſon's treading on the dog's toes, for it was owing to his not hanging the dog on the firſt notice. And the ſafety of the King's ſubjects ought not afterwards to be endangered. The *ſcienter* is the *git* of the action (1).

Action for keeping a dog uſed to bite.

(1) *Buxenden* v. *Sharp,* 1 *Salk.* 662. *Vide* 1 *Com. Dig.* action on the caſe for negligence, (A. 5.) 295. 5 *Com. Dig. Pleader.* (2 *P.* 2.) 607.

Elton *verf.* Brogden. At Guildhall.

If the failors force the mafter to go out of the courfe of the voyage, it is not a deviation. Park on Mar. Infur. 299. and the cafes there collected.

THE fhip *Mediterranean* went out in the merchants fervice with a letter of marque, and bound from *Briftol* to *Newfoundland*, infured by the defendant. In her voyage fhe took a prize, and returned with it to *Briftol*, and received back a proportionable part of the *premium*. Then another policy was made, and the fhip fet out, with exprefs orders from the owners, that if they took another prize, they fhould put fome hands on board fuch prize, and fend her to *Briftol*, but the fhip in queftion fhould proceed with the merchants goods. Another prize was taken in the due courfe of the voyage, and the captain gave orders to fome of the crew to carry the prize to *Briftol*, and defigned to go on to *Newfoundland*: but the crew oppofed him,
[1265] and infifted he fhould go back, though he acquainted them with the orders: upon which he was forced to fubmit, and in his return his own fhip was taken, but the prize got in fafe.

What is not barratry. Vide Park on Mar. Infur. 87. and the cafes there collected.

And now in an action againft the infurers, it was infifted, that this was fuch a deviation, as difcharged them. But the court and jury held, that this was excufed by the force upon the mafter, which he could not refift; and therefore fell within the excufe of neceffity, which had always been allowed. The plaintiff's counfel would have made barratry of it; but the Chief Juftice thought it did not amount to that, as the fhip was not run away with in order to defraud the owners. So the plaintiff had a verdict for the fum infured.

Gordon *verf.* Morley. }
Campell *verf.* Bordieu. } At Guildhall.

A fhip may go to the general convoy at the hazard of the under-writers. (1)

ON an infurance from *London* to *Gibraltar*, warranted to depart with convoy; it appeared there was a convoy appointed for that trade at *Spithead*, and the fhip *Ranger* having tried for convoy in the *Downs*, proceeded for *Spithead*, and was taken in her way thither.

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(1) *Bond* v. *Nutt*, *Cowp.* 601. *Lond. Trin. Vac.* 1780. *Park on Mar. Inf.* 309. *S. P.* *Enderby et al'* v. *Fletcher*. *Sit. in*

The infurers infifted, that this being the time of a *French* war, the fhip fhould not have ventured through the channel, but have waited in the *Downs* for an occafional convoy. And many merchants and office-keepers were examined to that purpofe. But the Chief Juftice held, that the fhip was to be confidered as under the defendants' infurance to a place of general *rendezvous*, according to the interpretation of the words, *warranted to depart with convoy*. *Salk.* 443, 445. And if the parties meant to vary the infurance from what is commonly underftood, they fhould have particularized her departure with convoy from the *Downs*. Bond v. Gonfales.

The juries were compofed of merchants, and in both cafes found for the plaintiffs upon the ftrength of this direction.

Eafter Term

20 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Juftice.*
Sir Martin Wright, *Knt.* }
Sir Thomas Denifon, *Knt.* } *Juftices.*
Sir Michael Fofter, *Knt.* }
Sir Dudley Ryder, *Knt. Attorney General.*
The Hon. William Murray, *Solicitor General.*

Thompfon *verf.* Tiller.

Practice.

THE defendant by leave of the court pleaded *non affumpfit*, and the ftatute of limitations; and delivered it to the plaintiff's attorney, who made up the iffue, and delivered it with notice of trial to the defendant's attorney, who paid for it. The plaintiff's attorney finding afterwards, it fhould have been made up with the clerk of the papers, went and paid him his fees, made up the record, and went to trial. And the court refufed to fet it afide, though the defendant made no defence. For *per curiam* he was in the firft fault, in not leaving the pleas in the office.

Baxter, Widow and Executrix, *verf.* Burfield.

Apprentice is not bound to ferve the executor of the mafter (1). 1 Bott by Conft, 523. pl. 745. S. C.

IN debt on bond, conditioned for *Matthias Anderfon*'s performance of the covenants in an indenture of apprenticefhip, whereby he was bound to the plaintiff's teftator, who was a mariner;

(1) *Rex* v. *Eakring*, *Burr. S. C.* 320. S. P.

mariner: the defendant pleaded, that *Anderfon* ferved faithfully to the death of the teftator: the plaintiff replied, that fince the death of the teftator, *Anderfon* had abfented from her fervice: to which there was a demurrer. And after argument at bar, the Chief Juftice delivered the refolution of the court, *viz.* That they were all of opinion, the defendant fhould have judgment; and the executrix could maintain no fuch action. The binding was to the *man*, to learn *his* art, and ferve *him*, without any mention of executors. And as the words are confined, fo is the nature of the contract; for it is fiduciary, and the lad is bound from a perfonal knowledge of the integrity and ability of the mafter, (*Hob.* 134. *Vaugh.* 182. 3 *Keb.* 519. and 1 *Keb.* 820. 1 *Sid.* 216) and they denied the cafe in 1 *Lev.* 177. An award (*Hil.* 8 *Ann. Horne* v. *Blake*) that an apprentice fhould be affigned, was held void; unlefs there was a cuftom, or the concurrence of the apprentice. And they held, it was not material, that according to *Cro. Eliz.* 553. the affets were liable on the mafter's covenant to maintain. Therefore judgment *pro def'.* (2).

(2) But fee 32 *Geo.* 3. *c.* 57. which impowers two juftices upon application within three months after the mafter's deceafe, to order apprentices with whom no more than five pounds has been paid at binding, to ferve out the remainder of their time with the widow, fon, daughter, brother, fifter, executor, or adminiftrator of fuch mafter, they having lived with and been part of his family at the time of his death.

Blackbourn *verf.* Matthias.

THE defendant pleaded the general iffue, but forgot to give notice at the fame time of a fet-off. And upon motion in time, the court gave leave to withdraw the plea, in order to deliver the fame plea again with a proper notice to fet off. And faid it had been done fo before. *Strange pro def'.* Practice as to a fet-off.

Vide poft. 1271, as to bringing money into court on the fame reafon (1).

(1) *Vide Giddings* v. *Giddings*, *Say. Rep.* 316. *Taylor* v. *Joddrell*, *B. R.* 1 *Wilf.* 254. *Secus* if the plea to be pleaded excludes the merits, as the ftatute of limitations. *Cox* v. *Rolt*, 2 *Wilf.* 253. See *Thornton qui tam* v. *Gibfon*, 1 *Wilf.* 157.

Keen, on the Demise of the Earl of Portsmouth et al', *vers.* the Earl of Effingham.

Where a bad deed to make a tenant appears, the court will not presume a good one though to support an old recovery.

ON a trial at bar, wherein the validity of two common recoveries in 1714 and 1721 came in question, it was ruled by the court, that though at such a distance of time proper tenants to the *præcipe* shall be presumed, where no deed appears (1); yet in this case, it appearing that there were deeds inrolled for that purpose, wherein proper parties did not join, and the uses were declared to have been warranted by such deeds; the court could not presume there were any others. And so directed the jury to find against the recoveries, which they did accordingly (2).

(1) *Warren ex dimiss. Webb* v. *Greenville, ante* 1129.

(2) *Vide Goodtitle ex dem. Bridges* v. *Duke of Chandos*, 2 *Burr.* 1065. where this case is cited and commented upon, *Ibid.* 1073.

[1268]

Anderson *vers.* Baddiflade.

Practice. Ante 1192. and the note.

ON a writ and declaration of this term, and an eight days rule to plead given, the defendant at the end of the eight days put in a plea in abatement: which the court on my motion set aside, for they only gave that time to plead in chief, and never intended to enlarge the time for a dilatory.

Dominus Rex *vers.* King et al'.

Indictment not quashable. Ante 1211.

THE court would not quash an indictment against overseers for not paying over-money to their successors, as quashing was not *ex debito justitiæ*, and this is a growing evil.

Dominus Rex *vers.* George Trevilian, Esq.

Q. Whether indictable for not taking an apprentice. 8 & 9 W. 3. c. 30. § 5.

AN indictment for not receiving an apprentice was quashed, because it did not appear to be a binding within 43 *Eliz.* c. 2. And the court said, that was not barely matter of evidence, but the circumstances must be averred. They would not meddle with the general question, whether an indictment would lie or not.

Trinity Term

21 Georgii 2 Regis. In B. R.

Sir William Lee, *Knt. Chief Justice.*

Sir Martin Wright, *Knt.*
Sir Thomas Denison, *Knt.* } *Justices.*
Sir Michael Foster, *Knt.*

Sir Dudley Ryder, *Knt. Attorney General.*

The Hon. William Murray, *Solicitor General.*

Symonds *vers.* Parmenter.

IN *assumpsit* by original against two defendants, the plaintiff shewed that he had outlawed one of them; and the other pleaded in bar, that his partner so outlawed was beyond sea at the time of the outlawry. And upon demurrer it was objected, that this could not be pleaded in bar: to which it was answered, that it could not be pleaded in abatement, because the defendant could not give the plaintiff a better writ; and the court would take notice, that it was in the plaintiff's power to prevent its being a bar, by discontinuing.

Assumpsit against two, and one outlawed, the other cannot plead in bar, that his partner so outlawed was beyond sea. More full 1 Black. 20. 4 Bro. Par. Ca. 604. S. C.

Sed per curiam, If this matter is ever to be pleaded, there will be an end of suing partners whilst any one is abroad, which is often the case. However it can never be good as a general bar; for though the defendant cannot give the plaintiff a better writ, yet he might demand judgment, (if there was any thing in the merits) whether the court would (as the record now stands) compel him to give any further answer. Therefore they gave judgment for the plaintiff.

Tindale *verſ.* Gwynne.

Venue changed from *London* to *Carmarthen.*

NOtwithſtanding the caſe of *Moore* v. *Fernyhouth*, (*ante* 1258.) I prevailed to have a rule to ſhew cauſe, why the *venue* ſhould not be changed from *London* to *Carmarthen*; and it was made abſolute on an affidavit of ſervice (1).

(1) *Whadington* v. *Thelwell*, 4 *Burr.* 2450. S. P. in *B. R.* and ſee the caſes there cited. *Price* v. *Gwynn*, *B. R.* 1 *Wilſ.* 221. but no deciſion. *Freeman* v. *Gwynn*, S. P. in *C. B.* 2 *Black.* 962. But ſee alſo *Pritchard* v. *Pugh*, *Doug.* 262. and the caſes cited *ib.* in [† 73.] But *Watkyns* v. *Hybert*, *Say.* 48. is contra.

Richardſon *verſ.* Jelly.

Practice.

PER curiam, Where the bail do not apply to ſtay the proceedings pending error, till their time to ſurrender is out; we will not give them any time for that purpoſe, but only four days to pay the money in, after the judgment is affirmed (1).

(1) *Vide* the caſes cited *Myer* v. *Arthur*, *ante* 419.

Collier *verſ.* Hague.

Practice.

THE plaintiff on going beyond ſea made an affidavit 4 *July* 1744, that the defendant was indebted to him in 27*l.* 16*s.* 6*d.* for goods ſold and delivered. On this affidavit proceſs was taken out 9 *May* 1747, and marked for bail. But the court ordered the defendant to be diſcharged on common bail; for though he owed ſo much in 1744, he might not owe it in 1747. And the act requires an oath of a ſubſiſting debt at the time of ſuing out the proceſs.

Allam *verſ.* Heber.

What is aſſets by deſcent. 1 Black. Rep. 22. S. C.

ON *riens per deſcent* pleaded, it appeared that the anceſtor deviſed the lands to the heir for payment of debts. And the court held, that notwithſtanding they were a charge on the land, yet the heir was in by deſcent; for the tenure is not altered. Caſes cited were *Salk.* 242. *Hob.* 30. *Dy.* 124. *Sti.* 148.

3 *Lev.*

3 *Lev.* 127. *Mo.* 644. *Cro. Eliz.* 833. 919. 1 *Roll. Ab.* 626. *J. Lutw.* 797. *Cro. Car.* 161. 2 *Mod.* 286. *Ld. Raym.* 728. And the ftatute of King *William* only charges other devifees (1).

(1) *Vide ante* 490. *Smith* v. *Triggs*, note (2) and *Martin* v. *Strachan*, *ante* 1179. *Vide Freemoult* v. *Dedire*, 1 *P. Wms.* 430. *Plunkett* v. *Penfon*, 2 *Atk.* 290. where lands thus devifed feem to have been confidered as legal affets fo as to give a preference in payment to fpecialty creditors. But in *Hargrave* v. *Tindal*, 1 *Bro. Chanc. Rep.* 136. *note*, Lord *Hardwicke* held, that though lands fo devifed defcended to the heir, yet that they were equitable affets fo as to entitle fimple contract creditors to a diftribution *pari paffu*. See alfo the opinion of Lord *Thurlow* in *Batfon* v. *Lindegreen*, 2 *Bro. Chanc. Rep.* 94.

Guy et ux' *verf.* Kitchiner et al'. [1271]

Practice at *nifi prius.*

IN affault and battery, the *memorandum* was generally of *Michaelmas* term, and the fact on *fon affault* proved, was on a day within the term, *viz.* 27th of *October*(1). And a cafe being made of this, it was held well enough; for the plaintiff needed have given no evidence on this plea, unlefs to aggravate damages; and the court will not nonfuit him, becaufe it is amendable by a new bill.

(1) This term was further abridged by 24 *Geo.* 2. *c.* 48. to commence 3d *November*.

Hookin *verf.* Quilter.

Executor cannot add a count in his own right. 1 Wilf. 171. S. C. more at large.

THERE were three counts in the declaration as executrix, and the fourth was for the ufe and occupation of the plaintiff's houfe. Judgment by default in *C. B.* and reverfed on error. For *per curiam*, There being no verdict, we can prefume nothing, but that the fourth count is, as it appears, in her own right, which cannot be joined with the others; and the damages are intire (1).

(1) *Vide Jones* v. *Wilfon*, 11 *Mod.* 256. *Petrie* v. *Hannay*, 3 *Term Rep.* 659. and that this would have been helped by verdict. *Bull. L. N. P.* 138. *Lee* C. J. contra, *Denifon* J. *pro.* 1 *Wilf.* 172.

Martin *verſ.* Chauntry.

What not a note within the ſtatute. Ante 629.

THE court held on error from *C. B.* that a note to deliver up horſes and a wharf, and pay money at a particular day, could not be counted on as a note within the ſtatute; and therefore reverſed the judgment (1).

(1) *Bull. L. N. P.* 272.

Remington *verſ.* Stevens.

Statute of limitations replied to a ſet-off.

IT was held, that the ſtatute of limitations may be replied to a plea of a ſet-off (1).

(1) *Bull. L. N. P.* 180. S. P. and that if it be given in evidence under a notice of ſet-off it may be objected to. *ib.*

Tarlton *verſ.* Wragg.

Practice.

THE court gave leave to withdraw the general iſſue, in order to bring money into court, and replead it; within the reaſon of *Blackbourn* v. *Matthias*, (*ante* 1267.) not delaying the plaintiff (1).

(1) Money may be paid into court after plea pleaded by obtaining a Judge's order for that purpoſe. *Per Buller* J. in *Griffiths* v. *Williams*, 1 *Term Rep.* 711.

[1272]

Howel qui tam *verſ.* James.

Act of grace.

AN information was filed in the crown-office on 8 *Geo.* 1. *c.* 19. which in caſes of the game gives the penalty between the informer and the poor. And the court held, that the crown having no intereſt, the defendant could not have the benefit of the act of grace, ſo as to ſtay proceedings on payment of coſts.

Harrison *verf.* Bearcliffe et ux'.

BOTH were arrefted for her debt *dum fola:* and the court difcharged her, and faid the hufband muft lie till he puts in bail for both. 1 *Lev.* 51. 216. and 1 *Vent.* 49. denied to be law (1). Baron and feme.

(1) *Roberts* v. *Andrews et ux.* 2 *Black.* 729. S. P. *Et vide* the cafes cited in *Pitts* v. *Miller, ante* 1167.

Oates *verf.* Shepherd.

THE term in ejectment being near expiring, it was amended, without any confent, from five years to ten years (1). Amendment.

(1) *Vide Doe* v. *Pilkington*, 4 *Burr.* 2447. where the demife being laid prior to the entry by plaintiff to avoid a fine, it was altered to a time fubfequent. But there the ftatute of limitations would otherwife have barred him in a new ejectment. See alfo *Roe* v. *Ellis*, 2 *Black.* 994. *Vicars* v. *Haydon*, *Cowp.* 841. Where *B. R.* amended the declaration by enlarging the term after judgment in *Ireland* had been affirmed here, and the record tranfmitted thither. But in the more ancient cafes the court refufed to enlarge the demife even where the plaintiff was delayed in his judgment until its expiration, either by an injunction out of Chancery at the defendant's prayer, or through the time taken by the court in determining upon the difficulties of his cafe, *Anon. Salk.* 257. *Scrape* v. *Rhodes*, *Barnes* 8. *Driver* v. *Scratton*, *Barnes* 17. *Roe* v. *Doe*, *ex dem. Stephenfon*, *ib.* 186. *Kefworth* v. *Thomas*, *Andr.* 208. *Thruftout* v. *Gray*, *caf. temp. Hardw.* 165. See alfo feveral other cafes to the fame purport cited in *Doe* v. *Pilkington*, 4 *Burr.* 2447.

Gimbart *verf.* Pelah. In Middlefex.

THE defendant juftified impounding cattle *damage feafant.* And on evidence it appeared he put them into the next pound, though it happened to be in another county. And on 3 *Lev.* 48. the Chief Juftice held, it did not make him a trefpaffer, though it fubjected him to the penalty in the ftatute 1 & 2 *Philip & Mary*, *c.* 12. Verdict *pro def'.*

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